

# EXHIBIT B.114

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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----x

MARK I. SOKOLOW, et al.,  
Plaintiffs, No. 04 Civ. 00397  
(GBD) (RLE)

vs.

THE PALESTINE LIBERATION  
ORGANIZATION, et al.,

Defendants.

-----x

DEPOSITION OF GARY L. WELLS, Ph.D.  
Des Moines, Iowa  
Wednesday, October 30, 2013

Reported by:  
Debra A. Hoadley  
Ref. No.: 10543

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October 30, 2013  
8:42 a.m.

Deposition of GARY L. WELLS,  
Ph.D., held at the Doubletree by Hilton  
Hotel, 6800 Fleur Drive, Des Moines, Iowa,  
pursuant to notice before Debra A. Hoadley,  
a Certified Shorthand Reporter and Notary  
Public of the State of Iowa.

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## -----REQUESTS-----

7:17 - updated list of publications  
198:16 - updated documents reviewed list

Draft Copy

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1 GARY L. WELLS, Ph.D.,  
2 called as a witness, having been first duly  
3 sworn by Debra A. Hoadley, a Notary Public  
4 within and for the State of Iowa, was  
5 examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MS. ROMEO:

8 Q. Dr. Wells.

9 A. Yes.

10 Q. My name is Carmela Romeo.

11 A. Hi.

12 Q. And I'm here with Tal Machnes. We're  
13 with Arnold & Porter, and we represent the  
14 plaintiffs in the above-referenced action.

15 So have you been deposed before?

16 A. Yes.

17 Q. How many times?

18 A. That's a good question. I could only  
19 estimate probably at least 20.

20 Q. So you're familiar with the ground  
21 rules then?

22 A. Yes.

23 Q. So I'll just remind you of a couple of  
24 brief ones.

25 A. Sure.

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1 Q. I'm going to ask you a series of  
2 questions. If any of my questions are not  
3 clear, please ask me to rephrase, and I will do  
4 so. And if you want to take a break at any  
5 point, please also let me know. We're going to  
6 shoot to take breaks every hour, hour and a  
7 half, okay?

8 A. Yes.

9 Q. So the first thing I want to do is  
10 hand you what's going to be marked as Plaintiffs'  
11 Exhibit 1. Just give me one minute, okay?

12 (Plaintiffs' Exhibit 1 marked on  
13 the record)

14 Q. Can you just take a look at it and  
15 review it; and when you're ready, just let me  
16 know.

17 A. Yes.

18 Q. Okay. What is that?

19 A. This is my curriculum vitae.

20 Q. And does that also include a list of  
21 your publications?

22 A. Yes, it does.

23 Q. And I see on the top of page 1 it says  
24 that this is through June 2013?

25 A. That would be right.

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1 Q. Do you have anything to add since  
2 then, whether with respect to publications or  
3 anything else that's on the C.V.?

4 A. Probably. Nothing that significant,  
5 but there would be another article or two in  
6 press.

7 Q. Are they relevant to your testimony  
8 here today?

9 A. They would not be something that I  
10 would need to rely upon at all, no.

11 Q. Do they touch upon the subject of  
12 eyewitness testimony?

13 A. Oh, yes.

14 Q. And do they touch upon the subject  
15 of human memory and judgment?

16 A. Yes.

17 MS. ROMEO: We ask that you could  
18 please produce an updated list of publications  
19 reflecting the two articles that Dr. Wells has  
20 just referenced.

21 Q. And so let's talk a little bit about  
22 your professional background. I see from your  
23 C.V. you've had a number of teaching positions  
24 over the years. You've also had a number of  
25 research positions over the years. So when did

Page 8

1 you first start studying eyewitness IDs?

2 A. 1974.

3 Q. And how much of your professional  
4 academic career would you say has been devoted  
5 to studying eyewitness IDs?

6 A. Well, it's been continuous throughout  
7 that time, and so it would be my dominant area  
8 of scholarship. So I don't know how one would  
9 calculate the percentage, but at least half of  
10 all my time is spent in research, so most of  
11 that time would be on eyewitness ID issues.

12 Q. And have you ever studied any of these  
13 topics in the context of terrorism?

14 A. In the context of terrorism --

15 Q. Uh-huh.

16 A. -- per se, no.

17 Q. And just to be clear, that would include  
18 either domestic terrorism or international  
19 terrorism?

20 A. Right. I mean, I guess depending on  
21 how one defines terrorism, I would say that --  
22 no. I would say, no, not in the context of  
23 terrorism per se.

24 Q. Going on with that, is there literature  
25 that does study eyewitness IDs in the context of

1 terrorism that you're aware of?

2 A. No, I don't think there would be any  
3 need for such a literature. I mean, eyewitness  
4 ID is eyewitness ID whether it's in criminal acts  
5 or -- you know, domestic criminal acts or terrorism.  
6 I mean, the presumption is that psychological  
7 processes are the same.

8 Q. But you would agree that different types  
9 of crimes produce different kinds of psychological  
10 trauma; correct?

11 A. That different types of crimes produce  
12 different types of psychological trauma? Well,  
13 psychological trauma is psychological trauma.  
14 It doesn't matter what contributes.

15 Q. Well, I'll give you an example. I  
16 mean, is it possible for a victim of a sexual  
17 assault to experience different psychological  
18 trauma from somebody who is mugged? At gunpoint.  
19 We can add that in.

20 A. Well, phenomenologically perhaps in  
21 terms of -- I mean, it's a different event, but  
22 the principles are the same, whether it's being  
23 a victim of a mugging or a sexual assault or  
24 something that would occur, you know, on a  
25 battlefield. I mean, it's the same -- it's the

1 same brain operating the same principles.

2 Q. Right.

3 But is it your position that  
4 because the processes are generally the same  
5 throughout victims of various crimes, that each  
6 victim would experience the same type of  
7 psychological trauma regardless of the event  
8 that they experienced?

9 A. Well, I don't know exactly how you're  
10 using the term "trauma."

11 Q. By "trauma," I mean in your report you  
12 discuss how, for instance, various factors such  
13 as fear and stress can affect a person's ability  
14 to remember --

15 A. Right.

16 Q. -- and to encode details.

17 A. Right.

18 Q. And what I'm getting at is whether  
19 every single person who is the victim of a crime  
20 experiences those factors and are affected across  
21 the board in the same manner or whether people  
22 have varying responses, depending on the situation  
23 that they're presented with.

24 MR. SATIN: Objection. Compound  
25 question. You can answer.

1 A. Well, fear and stress are fear and  
2 stress no matter their source.

3 Q. Correct.

4 Is it your position that people  
5 don't process fear and stress differently?

6 A. From one individual to another?

7 Q. Correct, from one individual to  
8 another.

9 A. People can try to cope with those  
10 stresses and different -- may have different  
11 coping strategies.

12 Q. So then it is your position that a  
13 person of a crime, regardless of what the crime  
14 is, they would be affected across the board in  
15 terms of their memory being impeded?

16 MR. SATIN: Objection. Vague.

17 A. The same kinds of -- if the same kinds  
18 of -- if they're experiencing stress and fear,  
19 it doesn't matter what its source is.

20 Q. Can a person who experiences stress or  
21 fear make a reliable identification?

22 A. It's possible, but stress and fear  
23 lower that likelihood dramatically.

24 Q. Is it possible for a victim of a crime  
25 to make an accurate identification?

1 A. Is it possible for a victim of a crime  
2 to make -- of course, yes.

3 Q. Going back to the point of the  
4 literature generally, is there literature that  
5 discusses eyewitness evidence in the context of  
6 crimes that occur in conflict zones? And I can  
7 explain further if you don't understand the  
8 question.

9 A. Well, I think I -- I think I understand  
10 the question. No, there's no presumption that  
11 there's any difference between a conflict zone  
12 and an event that might occur in a nonconflict  
13 zone as long as it's -- you know, in other words,  
14 if you -- if you have a gun pointed at you, it  
15 doesn't matter if you're in a combat zone or a  
16 noncombat zone.

17 Q. Well, to you what is the difference  
18 between a conflict zone and a nonconflict zone?

19 A. A conflict zone would be one in which  
20 I presume there are ongoing animosities among  
21 groups.

22 Q. And then in the nonconflict zone there  
23 would be no ongoing conflict; is that right?

24 A. Well, there would -- there would still  
25 be individuals who may be engaged in violent

1 acts.

2 Q. Right.

3 But the difference is that one can  
4 be more continuous and ongoing as opposed to  
5 another?

6 A. Yes.

7 Q. And is it your position that a victim  
8 who lives in a conflict zone where there may be  
9 ongoing conflict and may be accustomed or have  
10 seen such conflict is going to respond in the  
11 same way as a person in a nonconflict zone?

12 A. Yes.

13 Q. In your research and work to date, have  
14 you primarily focused on crime in the United  
15 States?

16 A. Well, I've focused on how people  
17 witness events and variables that influence the  
18 reliability of those events. The United States  
19 is no different from anyplace else in the world,  
20 humans are humans, in studying the psychological  
21 processes.

22 Q. So you don't think that different  
23 cultures play a role into those processes?

24 A. No.

25 Q. So then you would say that your work

1 is primarily universal in the sense that you  
2 look at a person who has certain psychological  
3 processes and that applies across the board?

4 MR. SATIN: Objection. Vague.

5 A. It applies to people, yes.

6 Q. Right.

7 And that applies to people  
8 regardless of whether they live in the United  
9 States or whether they live in the Middle East?

10 A. Yes.

11 Q. And that applies to a person who is  
12 the victim of a sexual assault or of a robbery?

13 A. Yes.

14 Q. Have you written any articles on the  
15 issue of crime severity?

16 A. Yes, a very early article just looking  
17 at how something that is very mundane might not  
18 draw the attention as much as something that is  
19 more significant.

20 Q. Is that still your position today?

21 A. What?

22 Q. The position you took in that article  
23 where you said that something that is more  
24 mundane might not draw attention to details such  
25 as a significant event.

1 MR. SATIN: Objection. Misstates  
2 the testimony.

3 A. That it might not go as noticed, yes.

4 Q. So in that publication you state that  
5 if the event is more significant. And actually,  
6 can you explain what you mean by "significant"?  
7 What does "significant" mean?

8 A. Well, in that work we just simply  
9 looked at whether someone might be a better  
10 eyewitness if they saw someone stealing an item  
11 that was of more value than some other item.

12 Q. And what do you mean by "mundane"?

13 A. By "mundane," I mean more everyday  
14 kinds of events.

15 Q. And in that article what was the  
16 result of your study?

17 A. Well, that someone paid more attention  
18 if they were asked to watch over an item that  
19 had higher value than if it had lower value and,  
20 therefore, were better able to identify later  
21 the person who took the item.

22 Q. So would you agree with me that  
23 property theft of higher value is generally  
24 categorized as more severe of a property crime  
25 as opposed to property theft of a lower value?

1 A. Sure.

2 Q. And while we're talking about kind of  
3 where the severity of crimes fall, to you in  
4 your opinion, where does terrorism fall?

5 MR. SATIN: Objection. Vague.

6 A. At a very extreme level. Unlike the  
7 kind of level in which we were just talking  
8 about which just might catch one's attention  
9 more, terrorism would begin to invoke notions  
10 like fear, distress and arousal.

11 Q. So is it your position that property  
12 theft doesn't invoke fear or stress?

13 A. It could, but I don't think it did in  
14 the work we did. We were just -- we were at a  
15 very low level. I don't think there's any --  
16 certainly no fear or stress.

17 Q. And if you had to give me a time  
18 estimate, how long ago was that, that article?

19 A. Oh, that was like published in like  
20 1978 or 1979.

21 Q. So you haven't done any work since then  
22 on issues of crime severity and how that may  
23 impact stress and fear levels?

24 A. I have not, no.

25 Q. Have others?

1 A. Well, not with crime severity per se,  
2 but with inducing stress, yes.

3 Q. And what other studies are there that  
4 are out there?

5 A. Well, there's -- for example, there's  
6 a study by Charles Morgan published in, I think,  
7 Psychiatry and Law looking at -- what Morgan did  
8 was took advantage of the military, U.S.  
9 military, interrogation simulations that were  
10 attempts to train U.S. military people to resist  
11 giving up information, for example, if they were  
12 captured.

13 And in that work the military, in  
14 some conditions, they would use a very intense,  
15 high stressful interrogation. In other  
16 conditions something that was more low level,  
17 almost interview-like. And then to the surprise  
18 of these military people later, they're shown a  
19 lineup to try to identify their interrogator,  
20 and they were much less able to do so and made  
21 many more mistakes if it was a stressful  
22 experience than if it was not a stressful  
23 experience.

24 Q. So you mentioned that to their  
25 surprise they were asked to attempt to identify

1 the person that was administering the  
2 interrogation.

3 A. Yes.

4 Q. Isn't that different from a victim of  
5 a crime who is experiencing the crime and knows  
6 that he or she is experiencing the crime and may  
7 later need to identify the suspect or the  
8 perpetrator?

9 A. Well, it could be if somehow under a  
10 high stressful circumstance, whether there are  
11 threats involved and so on, the person's primary  
12 motivation for some reason wasn't survival,  
13 wasn't attending to the carnage and so on and  
14 instead sat around calmly trying to encode or  
15 acquire information in some kind of prescient  
16 anticipation of a later need to try to identify  
17 someone, but that's not what people do.

18 Q. So then you stand by your earlier  
19 statement that the psychological process is  
20 going to be exactly the same for the person who  
21 is in a military course who is merely trying to  
22 survive conditions knowing that they may  
23 encounter them later on versus a person who is a  
24 victim of a crime and knows that he or she is  
25 experiencing the crime?

1 MR. SATIN: Objection. Misstates  
2 the testimony.

3 A. Can you repeat that again?

4 Q. Sure.

5 The point of my question is, you  
6 said earlier that psychological processes are  
7 the same.

8 A. Right.

9 Q. Because people are people.

10 A. Right.

11 Q. So we have a situation here where in  
12 the Morgan study they asked subjects who  
13 underwent a military survival training course to  
14 later identify their interrogator; so my  
15 question is, do you still stand by your earlier  
16 statement that the psychological processes, so  
17 of the military recruit subject, would be exactly  
18 the same and respond exactly the same as a  
19 victim who is experiencing a crime and knows  
20 that he or she is experiencing the crime?

21 A. Well, I think there's a lot going on  
22 in your question. The way I would have to  
23 answer it is that the -- yes, the psychological  
24 processes would be the same.

25 Q. So the psychological processes are the

1 same even though the incentive to identify is  
2 different?

3 A. Psychological process in that kind of  
4 situation is one of survival, and --

5 Q. I'm sorry, in which situation?

6 A. Both.

7 Q. Okay. You can continue.

8 A. Stress and fear have automatic  
9 responses in humans, and lower animals I might  
10 add; and it's a general principle of psychology  
11 that when stress and fear occur, the psychological  
12 processes involve one of survival. And what's  
13 congruent with survival is the -- is that the  
14 cognitive resources -- we have limited cognitive  
15 resources. Those cognitive resources are geared  
16 toward -- are geared toward surviving that  
17 situation, which is incompatible with calmly  
18 forming memories, so stress and fear impair  
19 memory for detail.

20 Q. In the Morgan study, was there a 0  
21 percent identification rate in the high-stress  
22 situations across the board?

23 A. 0 percent?

24 Q. Yes.

25 A. No.



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1 Q. So it is the case that under high-  
2 stress situations one can make an identification?

3 A. Well, it was pretty close to guessing,  
4 so when you guess, you can sometimes get things  
5 right.

6 Q. What's your basis for saying that it  
7 was pretty close to guessing?

8 A. Well, if you guess in a five-person  
9 lineup, one out of five are going to identify  
10 the right person.

11 Q. But what is that based on? Is that  
12 based on the study or is that based on --

13 A. Yes.

14 Q. What part of the study is that based  
15 on?

16 A. It's based on the data in the study.

17 Q. So I'm going to -- give me one second.  
18 We're going to mark the Morgan study as  
19 Plaintiffs' Exhibit 2.

20 (Plaintiffs' Exhibit 2 marked on  
21 the record)

22 Q. And just take a moment to flip through  
23 that and let me know when you're finished.

24 A. Okay. I guess I have two copies here.  
25 I thought that was a little thicker than I

Page 22

1 remembered it. Okay.

2 Q. Now, do you usually cite to the study  
3 in your reports?

4 A. Do I usually?

5 Q. Yes.

6 A. Pretty commonly, sure.

7 Q. And in your expert report in this  
8 case, was this the only study that you cited on  
9 the point for fear and stress affecting the  
10 plaintiff Varda Guetta's identification in this  
11 case?

12 A. I don't know. I'd have to see my  
13 report.

14 Q. Give me one moment. We will mark that  
15 as Plaintiffs' Exhibit 3.

16 (Plaintiffs' Exhibit 3 marked on  
17 the record)

18 Q. You can take a look at that and then  
19 let me know when you're finished.

20 A. Okay. Well, at this point I don't  
21 even see where I cited Morgan.

22 Q. I can point you to that. Why don't  
23 you take a look at page 3, Footnote 1.

24 A. Right. Yeah, okay. Looks like in  
25 answer to your question, that's the only study

Page 23

1 that I cited on that point.

2 Q. Okay. So let's turn to the Morgan  
3 study, and let's turn to page 272 of the Morgan  
4 study.

5 A. Uh-huh.

6 Q. And this goes back to my earlier  
7 question, whether there was a 0 percent rate of  
8 identification across the board in situations of  
9 high stress. Is that the case?

10 A. Right. Oh.

11 Q. It's not the case; correct?

12 A. No, and I said it wasn't the case, right.

13 Q. So we talked about the methodology of  
14 the study, which is that Dr. Morgan asked subjects  
15 after they underwent a military survival training  
16 course --

17 A. Uh-huh.

18 Q. -- to attempt to identify their  
19 interrogators?

20 A. Right.

21 Q. Can you tell me a little bit about the  
22 interrogations and what the difference is between  
23 the high-stress and the low-stress interrogations?

24 MR. SATIN: Objection. Compound  
25 question.

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1 A. Well, only in the sense that the high-  
2 stress interrogation was threatening. It was a  
3 high-intensity exchange meant to stress the  
4 individual, and the low-stress interrogation was  
5 more interview-like.

6 Q. And when you say intended to stress  
7 the individual, that's for purposes of the  
8 military survival training course?

9 A. Right.

10 Q. Because those subjects may later have  
11 experienced conditions similar to that, and the  
12 purpose of the course was to prepare them for  
13 that?

14 A. Yes.

15 Q. Do you know what "high intensity"  
16 means? What kind of threat were the subjects  
17 exposed to?

18 A. Well, I don't -- I don't recall them  
19 being highly explicit about that. I mean, I  
20 could look here and try to refresh my memory on  
21 that. Is that what you'd prefer I do?

22 Q. Well, why don't you take -- I'll  
23 direct your attention to page 268 to -69.

24 A. All right.

25 Q. And if you go to the last paragraph

Page 25

1 and you read that going on to page 269. And you  
2 can let me know when you're finished.

3 A. Okay. I'm finished.

4 Q. Does that refresh your memory at all  
5 as to what the high-stress interrogations  
6 entailed?

7 A. Well, it refreshes my memory as to  
8 what they said it entailed, yes.

9 Q. And what's your understanding of that?

10 A. That there was high-stress interrogation  
11 involved, physical confrontation; where the low-  
12 stress interrogation involved no physical  
13 confrontation, but instead attempts to sort of  
14 trick the witness.

15 Q. So it's your position that this is  
16 your understanding of what the high-stress  
17 interrogation entailed, what's in this study?

18 A. Well, that's my understanding. My  
19 understanding can only be what they -- what they  
20 say.

21 Q. So you don't know what types of  
22 physical confrontation these subjects were  
23 exposed to?

24 A. They're not specific about that.

25 Q. Okay. I'm going to mark this as --

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1 not this one, excuse me. We're going to mark  
2 the next exhibit as Plaintiffs' Exhibit --

3 MS. ROMEO: What are we on now, 4?  
4 5?

5 THE COURT REPORTER: 4.  
6 (Plaintiffs' Exhibit 4 marked on  
7 the record)

8 Q. Do you recognize this?

9 A. No.

10 Q. Have you ever seen it before?

11 A. Not to my knowledge, no.

12 Q. Let's turn to -- it's going to be the  
13 Westlaw cites page 26 to 27. I'll tell you  
14 exactly what page that is, though, of the  
15 document. And just for the record, this is a  
16 case called People versus Abney. The cite is 31  
17 Misc.3d 1231(A) 932 N.Y.S.2d 762, 2011 WL  
18 2026894 in the New York State Supreme Court.

19 And if you turn to page 15 of the  
20 actual document, you'll see that there's a 27  
21 with a star in the middle of the page. Just let  
22 me know if you are following along. You're  
23 correct, it's right there.

24 A. Okay.

25 Q. So why don't you take a look at this

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1 and then let me know when you're finished.

2 A. Okay.

3 Q. And then before we discuss it, why don't  
4 you also -- we're going to turn to Footnote 35,  
5 which is on page 32 of the document, and it's  
6 the very first footnote. Just take a look at  
7 that.

8 A. Okay.

9 Q. So you've never seen this case before;  
10 correct?

11 A. Right.

12 Q. And were you aware that there was  
13 testimony in the New York State Court by another  
14 expert, Dr. Nancy Franklin, who at least at the  
15 time was a professor at Stony Brook, New York,  
16 who testified that she learned during a  
17 telephone conversation with Dr. Morgan that the  
18 high-stress interrogations involved violent acts  
19 such as waterboarding or having a loaded gun  
20 placed to their heads?

21 MR. SATIN: Objection. Compound  
22 question.

23 A. I'm unaware of that.

24 Q. And the study does acknowledge that  
25 there was food and sleep deprivation, correct,

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1 for the subjects?

2 A. For everyone.

3 Q. Correct. It does; is that what you're  
4 saying?

5 A. Yes.

6 Q. Right.

7 And also after this initial period  
8 of food and sleep deprivation, the subjects were  
9 then confined in separate cells. Is that your  
10 understanding as well of the study?

11 A. For everyone, both high and low stress.

12 Q. And then they went on and, to their  
13 surprise, were asked to identify their  
14 interrogator?

15 A. Yes.

16 Q. Do you have any reason to believe that  
17 the plaintiff Varda Guetta in this case was  
18 deprived of food and sleep for forty-eight hours  
19 before she was driving down the road upon which  
20 there was a shooting attack against her?

21 A. No, but I think it's irrelevant.

22 Q. Do you have any reason to believe it?

23 A. No.

24 Q. Do you have any reason to believe that  
25 she was confined to a solitary cell for a



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1 certain number of hours prior to being shot at?

2 A. No.

3 Q. Do you have any reason to believe that  
4 she was waterboarded before she was shot at?

5 A. No.

6 Q. And even though she was shot at, did  
7 she have a loaded gun in her face or to her  
8 head?

9 A. No. She was too far away from the  
10 shooter for that.

11 Q. Well, she was being shot at by the  
12 shooter from his car --

13 A. Right.

14 Q. -- to her car.

15 A. Right.

16 Q. So why is this study relevant?

17 A. Because they induced stress, and they  
18 showed that stress impaired their ability to  
19 identify the person later.

20 Q. Not across the board. There were  
21 people that were in the high-stress interrogation  
22 settings that did make accurate identifications,  
23 whether they were positive or negative ones;  
24 correct?

25 A. Right. I mean, they made a lot of

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1 misidentifications. Some of them did pick out  
2 the right person, but at a greatly impaired  
3 level of performance.

4 Q. If your position is that everyone  
5 experiences this type of psychological trauma in  
6 the same way, then how could it be that anybody  
7 made an accurate identification, even if it was  
8 one person? How is that possible?

9 A. Well, you still -- you still get bits  
10 and pieces of information, and those bits and  
11 pieces might allow you to do better than chance,  
12 which is all we're seeing here. It's just  
13 better than chance.

14 Q. Before we move on, let's talk about  
15 another point in the Morgan study. If you go to  
16 page 272. We're going back to Exhibit 3. Just  
17 let me know when you're there.

18 MR. SATIN: I have this as  
19 Exhibit 2. Is this Exhibit 3?

20 MS. ROMEO: Oh, I'm sorry. Is it  
21 Exhibit 2?

22 THE WITNESS: Correct.

23 MS. ROMEO: You may be correct.

24 Q. So Exhibit 2.

25 A. I am there.

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1 Q. The one finding that I found  
2 interesting, and maybe you can tell me why you  
3 think this is, is that there was a hundred  
4 percent identification rate in both the high-  
5 stress and low-stress conditions for true  
6 negative responses in the sequential photo  
7 method.

8 So first of all, can you explain  
9 to me what a sequential photo method is?

10 A. Yes. It's where you're presented with  
11 photos one at a time and you have to make a  
12 decision on each before you can get to the next  
13 one.

14 Q. And can you explain to me what a true  
15 negative response is?

16 A. A true negative is where you reject --  
17 where you reject, hence the negative, correctly.

18 Q. So that would mean that the interrogator  
19 was not in the lineup and the subject correctly  
20 noted that the person was not in the lineup?

21 A. The witness did not identify anyone.

22 Q. Is achieving a 100 percent rate common  
23 in any of these studies?

24 A. No, but it's also uncommon to only  
25 test ten people there.

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1 Q. So usually how many people does a  
2 study need for there to be a better  
3 representative sample?

4 A. With these kinds of data, which are  
5 what we call a dichotomous data, you know, you  
6 need -- you need at least 30 to stabilize, to  
7 have any kind of meaningful statement.

8 Q. Just looking through these numbers, it  
9 seems like there are quite a number of low  
10 subjects. There's the live lineup method for  
11 true negative responses, 38 people. Photo-  
12 spread method, 23 people. Sequential photo  
13 method for false negative responses, 41 people.  
14 Photo-spread method for low stress, 24 people.

15 A. And where did you see the 21?

16 Q. The 21 is -- maybe I misspoke. Sorry,  
17 24. So the photo-spread method in the low  
18 stress was 24. There's also photo-spread method  
19 for true negative response, 23. And then we've  
20 got a bunch of numbers in the forties and the  
21 fifties.

22 So if your position is you need at  
23 least 30, then aren't many of these examinations  
24 of the various identifications flawed?

25 A. Well, if you break it down too finely

1 they are; but if you collapse over high and low  
2 stress, you have large ends.

3 Q. But you feel this is the best study  
4 that you can cite to in this field?

5 MR. SATIN: Objection. Vague.

6 A. I think it's -- I would say it's  
7 probably the best that the field has on the  
8 stress question.

9 Q. One other thing. Let's go back to the  
10 sequential photo method and the hundred percent  
11 rate. Do you know what instructions those  
12 individuals were given prior to making the  
13 identification?

14 A. I would have to look. Want me to  
15 look?

16 Q. Sure. I'll direct you to it. Why  
17 don't you take a look at 270. And you can take  
18 a look at the second large paragraph with the  
19 concluding, so it's basically Section 2.3.

20 A. Okay.

21 Q. So what instructions were they given?

22 A. Well, they're just given instructions  
23 to write, to indicate yes or no to each photo,  
24 and then to indicate 1 to 10 where that's meant  
25 to reflect their level of confidence or

1 certainty.

2 Q. Were they also instructed that once  
3 they chose a person, to hand in their paper and  
4 then put down their head on their desk?

5 A. Once they chose a person, they were --  
6 the procedure was stopped, yes.

7 Q. For that person?

8 A. Right.

9 Q. All of these subjects were assembled  
10 in one classroom, though; correct? That's what  
11 the beginning of the second paragraph says, "Once  
12 the subjects were assembled in the classroom"?

13 A. Yes.

14 Q. So they were all in one classroom.  
15 And a sequential lineup is, as you explained,  
16 one photo coming up at a time, and each subject  
17 was given one full minute to view each photo;  
18 correct?

19 A. Right.

20 Q. So a true negative rate means that the  
21 person was -- they said that the person who  
22 interrogated them was not in the lineup; correct?

23 A. But they never said yes to any of them.

24 Q. Right.

25 So wouldn't that mean by the end,

1 by the last picture, every single person's head  
2 would still be up and not one person would have  
3 put their head down?

4 A. That would be a logical conclusion.

5 Q. So is that one reason that there  
6 was -- potentially a reason, that there could  
7 have been a hundred percent rate achieved in  
8 both categories?

9 A. I mean, I don't think it's a great  
10 procedure, but the sequential procedure does  
11 produce fewer false IDs.

12 Q. But in this case for the 100 percent  
13 rate that was achieved in this study, could that  
14 have been a reason why that rate was achieved?

15 A. I suppose it's possible.

16 Q. So when you choose to put a study in  
17 your report, do you look at the methodology and  
18 evaluate all of those factors?

19 A. Sure. I make a judgment about any  
20 study that I cite.

21 Q. And did you do that with this one?

22 A. Certainly. I mean, it's been quite a  
23 while since I read it, but, yes.

24 Q. When was the last time you read it?

25 A. It's probably been four or five years,

1 anyway.

2 Q. When did you draft your report in this  
3 case?

4 A. Earlier this year.

5 Q. Can you give me an approximate time?

6 A. The report has a date on it, doesn't  
7 it? Maybe it doesn't have a date on it.

8 Q. I believe it does.

9 A. I would say July 15, 2013.

10 Q. That's correct.

11 So you didn't read the study while  
12 you prepared this report?

13 A. I didn't feel I had to.

14 Q. So you didn't. You decided to cite to  
15 it?

16 A. Oh, I read the study before the report.  
17 I've probably read it five times.

18 Q. Right.

19 But my question is, did you read  
20 the study while you were preparing your report  
21 in connection with this case?

22 A. No.

23 Q. What about the other studies in your  
24 report? Did you read them while you were  
25 preparing your report in this case?

1 A. I don't feel like I have to  
2 necessarily read them all again. I know the  
3 conclusions. I know my original judgments on  
4 them.

5 Q. But wouldn't you say that the way that  
6 a study is conducted has a very big impact on  
7 the validity of its conclusion?

8 A. Right.

9 Q. So if you were presented with a study  
10 where you felt it was methodologically flawed --

11 A. Right.

12 Q. -- would you put it in your report?

13 A. No.

14 Q. Would you put it in your report even  
15 if other people cited to it in the field?

16 A. No.

17 Q. So do you feel that this is a  
18 methodologically sound study?

19 A. For the purpose of the point I made.

20 Q. And what's that purpose of that point?

21 A. Stress interferes with memory for  
22 details.

23 Q. How could the conclusion be reliable  
24 if in order to get to that conclusion, the  
25 procedures were flawed, or may have been flawed?

1 A. I'm not looking at the little ten  
2 people who in the sequential procedure were  
3 shown what we call an absent lineup. I'm  
4 looking at the overall results when you collapse  
5 across these and consistently show that  
6 performance is weaker in the stress conditions.

7 Q. But isn't a whole made up of parts?

8 MR. SATIN: Objection.  
9 Argumentative, vague.

10 Q. For example, if the underlying  
11 information is flawed, how could the results be  
12 accurate?

13 A. Well, even if you ignore that cell,  
14 you still have plenty to look at, and there's --  
15 that cell is contributing very little to anything  
16 that's there.

17 Q. Is that even the case --

18 A. Moreover, the procedure was the same  
19 whether it was -- the sequential procedure that  
20 you're talking about, whether it was stress or  
21 no stress, so it can't explain the stress  
22 variable to focus on something about that  
23 procedure.

24 Q. So then you stand by your use of this  
25 study in your report?

1 A. I stand by the idea that this study  
2 supports, helps support, the proposition that --  
3 and the general assumption and the psychological  
4 literature that stress impairs memory, doesn't  
5 help memory.

6 Q. But you would agree that this does  
7 not, by any means, definitively establish that?

8 A. No single study can.

9 Q. So that's all it is. It's an assumption  
10 based on research that's conducted by various  
11 people; correct?

12 MR. SATIN: Objection. Misstates  
13 the testimony.

14 A. Well, that's what all scientific  
15 assumptions and conclusions are based on,  
16 research conducted by various people.

17 Q. So let's move on to -- let's talk a  
18 little bit about your experience as an expert  
19 witness. At the beginning of this deposition,  
20 you testified that you have testified  
21 approximately 20 times; is that correct?

22 A. It's a guess.

23 Q. A rough estimate is fine. You don't  
24 need to --

25 A. That would be approximately right, I

1 think.

2 Q. And that's over the course of your  
3 career?

4 A. Right. Although your question was --  
5 you know, I'm not a lawyer, so when you said  
6 "testified," I assume that -- so you mean even  
7 if it's just a deposition --

8 Q. Yeah. So let's --

9 A. -- and it never goes to trial.

10 Q. Yeah. I'll be more specific.

11 A. Okay.

12 Q. When I say "expert witness," right now  
13 just for purposes of getting an idea of your  
14 experience, I just want to know everything, so  
15 deposition testimony as well as trial testimony.

16 A. Okay. Then I would -- I would say 20  
17 is about right.

18 Q. 20 is about right. Okay.

19 And on average, how many cases are  
20 you retained to do expert work in over the course  
21 of a year?

22 A. I agree to no more than two in any given  
23 year.

24 Q. And what's the breakdown for plaintiffs  
25 and/or the state, depending on if it's civil or

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1 criminal, versus defendants? What's the  
2 breakdown? Who do you usually work for?

3 A. Well, I haven't given expert testimony  
4 in a criminal trial for probably fifteen years.  
5 I just don't do it. I refer all those cases to  
6 other people, so -- and then in the civil trials  
7 it's -- they've all been for the plaintiffs.

8 Q. And is there a reason why you don't  
9 testify in criminal trials anymore? Why the  
10 change?

11 A. Because I don't have time, and I find  
12 that they're less interesting.

13 Q. Why do you find them less interesting?

14 A. Because most of them are pretty  
15 run-of-the-mill robbery cases and other things,  
16 and usually the discovery processes are -- you  
17 don't learn a lot about what really happened.  
18 Civil cases you tend to learn more, although  
19 this case may be an exception to that.

20 Q. So prior to that, did you testify in  
21 criminal trials?

22 A. I did, some.

23 Q. Now, with respect to the civil cases,  
24 what type of civil cases? You said you usually  
25 represent plaintiffs, so --

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1 A. Right.

2 Q. -- what's the subject matter of these  
3 cases?

4 A. Well, it's eyewitness identification.  
5 They are cases in which a person was convicted  
6 based on primarily or sometimes exclusively  
7 eyewitness identification evidence. And the --  
8 and it was proven to be a wrongful conviction,  
9 overturned, and then the question is what were  
10 the procedures that were used by investigators  
11 to obtain that identification and in what ways  
12 were those procedures flawed, if they were  
13 flawed.

14 Q. And the convictions were overturned,  
15 you said. Is that because of DNA evidence?  
16 What other sorts of things?

17 A. DNA, fingerprints leading to the real  
18 perpetrator who then confesses. You know,  
19 anything that -- mostly DNA cases, but anything  
20 that would prove definitive enough for a court  
21 of law to step in, free the person from prison  
22 and declare them innocent.

23 Q. Here this is a civil case; correct?

24 A. Right.

25 Q. But you're actually representing a

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1 defendant.

2 A. Yes.

3 Q. Or you're working with defendants.

4 A. Yes.

5 Q. Is this the first case that you've  
6 worked with the defendant on the civil side?

7 A. Yes.

8 Q. And is this also the first case that  
9 you're working with on the civil side where the  
10 ID is not known to be either accurate or  
11 inaccurate?

12 A. Well, it depends on -- I would have to  
13 answer that in a more nuanced fashion, because  
14 there have been some cases in which despite a  
15 Court declaring a person innocent, the defense  
16 wants to maintain the idea that but maybe they  
17 did it anyway. So there sometimes is a  
18 contention that or a failure to stipulate that  
19 the person was innocent.

20 Q. But in those cases the defendant is  
21 still usually the city or the county or  
22 something of that sort?

23 A. Yes.

24 Q. And the basis for the conviction,  
25 which was primarily the ID, was still overturned

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1 for some reason; correct?

2 MR. SATIN: Objection. Vague.

3 A. Yes.

4 Q. So then this is the first case where  
5 we have no idea whether her ID is right or wrong  
6 that you're testifying in?

7 MR. SATIN: Objection. Misstates  
8 the record.

9 A. Correct. I think that's why I was  
10 retained, is to speak to that issue.

11 Q. Right.

12 But what I'm trying to get at and  
13 just to get a clear answer for the record, prior  
14 to this case, none of your prior expert work has  
15 been in a civil case where the perpetrator or  
16 suspect has not yet been convicted of anything  
17 and all you have is an ID and we don't know  
18 whether it's accurate or inaccurate; is that  
19 right?

20 A. Yes, I believe that would be correct.

21 Q. Have you ever testified in a case that  
22 involved acts of terrorism? And by "terrorism,"  
23 you know, we can go forward with the definition  
24 of domestic or international.

25 A. No.



1 Q. Is this your first antiterrorism act  
2 case?

3 A. First what?

4 Q. Antiterrorism act case that you're  
5 testifying in?

6 A. Yes.

7 Q. Are you aware that this case is  
8 brought under the antiterrorism act in part?

9 A. I don't know. No, I wasn't aware of  
10 that. It's irrelevant to me.

11 Q. Have you been involved in any other  
12 case that involves the PA, the Palestinian  
13 Authority?

14 A. No.

15 Q. What about the Palestinian Liberation  
16 Organization?

17 A. No.

18 Q. Let's talk about now the substance of  
19 your prior expert experience. You explained to  
20 me that you used to testify in some criminal  
21 trials.

22 A. Yes.

23 Q. What was the scope of your expert  
24 opinion in those cases? What did you opine on?  
25 What was the purpose of your expert opinion?

1 MR. SATIN: Objection to compound  
2 question.

3 A. The purpose of the expert opinion was  
4 to assess the various factors that might bear on  
5 the reliability of the identification evidence  
6 that's being used in the case.

7 Q. And did you ever opine on whether the  
8 ID at issue in a criminal case was, in fact,  
9 reliable or unreliable?

10 A. As long as I was asked that question,  
11 I answered that question, yes.

12 Q. So in a criminal case you've testified  
13 as to whether an ID based on the facts of that  
14 case is reliable or not reliable?

15 A. I have, although most prosecutors will  
16 not ask that question. And if the question gets  
17 asked, I wait to see if the Court's going to  
18 allow me that opinion, and they have a couple of  
19 times, but --

20 Q. But not all -- oh, finish.

21 A. But my -- but in general I try to -- I  
22 restrict my testimony to the question of whether  
23 under the circumstances an identification could  
24 be reliable. I try to not speak to the ultimate  
25 issue of whether the defendant is guilty, which

1 is a totally different question.

2 Q. So in civil cases these have all  
3 involved cases where the ID is known to be  
4 inaccurate, wrong for some reason?

5 A. Yes.

6 Q. And the scope of your expert opinion  
7 in those cases, can you tell me what the purpose  
8 of your opinion in those cases is?

9 A. To talk about the procedures that were  
10 used for obtaining the identification, how did  
11 this mistake happen.

12 Q. So then what's the purpose of your  
13 expert testimony in this case?

14 MR. SATIN: Objection.

15 A. To speak to the reliability of an  
16 identification that would occur under these  
17 circumstances.

18 Q. Could you not get to the same result  
19 by just identifying the factors that may affect  
20 the ID or may not affect the ID?

21 A. I'm not sure I understand the question.

22 Q. My question is really, is the second  
23 part of your report necessary to effectuate that  
24 purpose?

25 A. Well, ultimately there's an integration

1 of the prior material, like taking into  
2 consideration the science that we know on  
3 eyewitness identification, how memory works and  
4 so on and to make a statement that integrates  
5 that about the reliability of the identification.

6 Q. But by making -- let me back up for  
7 one moment.

8 So it's your position that the  
9 question of whether an ID is reliable or not  
10 reliable is different from the ultimate question  
11 of whether a suspect, in fact, committed the  
12 crime, the ultimate issue?

13 A. Yes, because you can use a totally  
14 unreliable procedure, but let's suppose -- for  
15 example, let's suppose that you have a case  
16 where it was pitch-dark. We know that the human  
17 eye can't see in that light. I'm just using a  
18 hypothetical here.

19 Q. Uh-huh.

20 A. Where if we had that, for example, we  
21 could say that any subsequent ID itself is  
22 unreliable, but the question of whether the  
23 defendant is guilty would have to rest on other  
24 evidence. So what it's saying is this is not  
25 evidence. The ID is not evidence. If you've



1 got something else that speaks to the question  
2 of guilt, that's another matter.

3 So I'm not making a statement  
4 about whether the -- let's say, the suspect in a  
5 criminal case is guilty. That's for the Court  
6 to decide. What I'm saying, what I might say,  
7 though, is that this is not evidence of it.

8 Q. Well, isn't it the jury's position to  
9 assess the weight of evidence?

10 A. The weight of a -- of a -- of course  
11 it is, the weight of a category of evidence,  
12 so --

13 Q. So when you opine that an ID is not  
14 reliable, it's your position that that ID should  
15 be taken away from the jury; is that correct?

16 A. Not necessarily. That's up to the  
17 Court to decide. My opinion would be that the  
18 ID is unreliable. It's up to the Court to decide  
19 whether to take it away or not.

20 Q. But if the ID is not --

21 A. The Court might allow it and also  
22 allow me to say that I think it's unreliable.

23 Q. Is it your position that an unreliable  
24 ID is not evidence?

25 A. Yes, by definition, I think.

1 Q. So if it's not evidence, why should it  
2 go before a jury?

3 A. That's up to the Court to decide.

4 Q. So why are you rendering an opinion on  
5 whether it's reliable?

6 A. Well, the Courts often say let it go  
7 to weight, let it go to the jury, let the jury  
8 hear what Dr. Wells has to say and decide  
9 themselves.

10 Q. So do unreliable -- let's define a  
11 couple of terms.

12 What does "reliable" mean to you  
13 in the context of eyewitness evidence?

14 A. "Reliable," assuming it's -- in the  
15 context of eyewitness evidence, "reliable" is  
16 similar to what the Court would call or Courts  
17 would call probative value; that is, does it --  
18 you know, with or without this evidence, does it  
19 make it more or less -- does the presence or  
20 absence of this evidence make it more or less  
21 likely that the ultimate question to be decided  
22 would go one way or another.

23 Q. And what does "unreliability" or  
24 "unreliable" mean in the context of eyewitness  
25 evidence?

1 A. It means that the presence and absence  
2 of this evidence does not actually change the  
3 probability of the ultimate fact.

4 Q. And if I use the term "accurate  
5 identification," what does that mean to you?

6 A. An accurate identification is just  
7 simply when a witness identifies someone who  
8 also turns out to be the perpetrator.

9 Q. And an accurate ID can be reached from  
10 either an unreliable ID or a reliable ID?

11 MR. SATIN: Objection. Vague.

12 A. Well, an accurate ID can be reached  
13 through an unreliable process through -- by a  
14 number of means.

15 One is, for example, if someone  
16 used the dark room example again; right? I  
17 mean, if prior to the lineup or photographic  
18 lineup or any other kind of identification  
19 procedure someone were to tell the witness,  
20 "Hey, pick Number 3," right, that's an unreliable  
21 identification. But if Number 3 happens to be,  
22 in fact, the perpetrator, it would be an  
23 accurate identification. That would be among  
24 the sort of illegitimate ways in which a  
25 reliable ID sort of manages to get the right

1 answer anyway.

2 Q. And then an inaccurate ID, from my  
3 understanding, would be an ID that turns out to  
4 be, in fact, false, so like a DNA exoneration  
5 case, for example?

6 A. Yes.

7 Q. So reliability and accuracy are  
8 different concepts; is that right?

9 A. They are.

10 Q. And as we've just discussed, an  
11 unreliable ID can still yield an accurate  
12 identification?

13 A. Despite being unreliable.

14 Q. And a reliable ID could yield an  
15 inaccurate identification despite its being  
16 reliable?

17 A. It could by those definitions, yes.

18 Q. So your expert opinion then in this  
19 case, just explain to me one more time what the  
20 purpose of it is.

21 MR. SATIN: Objection. Asked and  
22 answered.

23 Q. Using these terms that we've just  
24 defined.

25 MR. SATIN: Asked and answered.

1 A. Is to speak to the reliability of the  
2 identification.

3 Q. And in order to speak to the  
4 reliability of the identification, what do you  
5 need to do? How do you assess whether an ID is  
6 or is not reliable?

7 A. Well, you assess all of the known  
8 relevant factors, so you assess the conditions  
9 of -- the known conditions that existed for  
10 purposes of acquisition, of a reliable memory  
11 trace; the storage of what we call retention  
12 phase, things that might have happened during  
13 that time of retention, the length of the  
14 retention and so on. And then you assess also  
15 the retrieval phase, that is by which we mean  
16 primarily the methods that were used for testing  
17 that memory, the identification methods.

18 Q. But this is really only kind of part  
19 one; right? You would also assess the actual  
20 identification procedure; correct?

21 A. That's the third.

22 Q. That's the third one?

23 A. Yeah, that's part of retrieval.

24 Q. Okay. So can you just elaborate a  
25 little bit on the retrieval factor?

1 A. Well, retrieval, successful -- you  
2 know, successful retrieval or, you know what I  
3 mean, retrieval can have lots of various kinds  
4 of biases in the test.

5 And so, for example, if you use a  
6 method in which you, let's say, put in front of  
7 the witness a number of people, or photos of  
8 people, who any one of which would be construed  
9 as a suspect if picked -- if picked, that's an  
10 unreliable procedure in and of itself regardless  
11 of what preceded it. The end product can't be  
12 better than any one of the steps along the way.

13 The problem with that one, of  
14 course, is that it's not really a test. It's  
15 not a controlled test of the witness' memory at  
16 all in the sense that there's no known way to  
17 fail it.

18 Q. So going back to what you just said  
19 that the end product can't be better than the  
20 steps?

21 A. Right.

22 Q. So if it's your opinion that the  
23 chances of acquisition -- let's take this  
24 step-by-step. That the chances of acquisition  
25 are so low as to be almost at -- you know,

1 almost zero here, okay --

2 A. Uh-huh.

3 Q. -- why is it relevant to go on to  
4 retention?

5 A. You would always -- you would always  
6 assess all three levels. You know, when you --  
7 you can't say -- with some exceptions. I mean,  
8 there are exceptions. We know, for example --  
9 so let me give -- let me give the nuanced answer,  
10 I guess. You're being patient with me on this.

11 Q. Sure.

12 A. But if, for example, at the level of  
13 acquisition we could truly say that it was zero,  
14 then one could argue that anything that follows  
15 that isn't necessary.

16 So, for instance, we know that,  
17 you know, if illumination is zero, human vision  
18 doesn't work. We know that -- for example, we  
19 know now from controlled studies that if someone  
20 is 300 yards away, it's the same as it being  
21 pitch-dark, even if it's the bright part of the  
22 day.

23 So again, the acquisition is  
24 functionally zero; but unless you have something  
25 that's that extreme and you can definitively say

1 it's zero, you're always going to look at the  
2 other -- the other stages of memory.

3 Q. And that would be the same if even at  
4 the retention stage the chances are so low, you  
5 would still go on to retrieval?

6 A. Right.

7 Q. If the acquisition and retention  
8 variables together are so low, so the  
9 opportunity to view the lighting, et cetera, as  
10 well as retention, so let's just say the ID  
11 takes place after a long period of time, how  
12 could an ID ever be reliable looking at  
13 retrieval factors?

14 Let's say you have that situation  
15 with poor acquisition and retention variables  
16 and you have the most optimal procedure used for  
17 retrieval. How would that affect your analysis?

18 A. Well, it would still -- you know,  
19 obviously it would still be -- in the end the  
20 analysis would still be no better than the --  
21 than the poor previous two stages that preceded  
22 it. But generally speaking, what happens is  
23 that if you have very extremely poor conditions  
24 at acquisition, extremely unfavorable conditions  
25 during the retention or storage phase, right,

1 that if you then use a pristine procedure at  
2 retrieval, you're not going to end up with a  
3 contentious outcome in the first place because  
4 the witness can't perform the task.

5 Q. So in that situation it's not  
6 necessary to analyze retrieval?

7 A. For purposes of the thoroughness of  
8 any report, you would do all three no matter  
9 what. You would never stop that process.

10 Q. And in assessing these three  
11 variables, what are the sorts of materials that  
12 you usually review?

13 A. Whatever's available that bears on  
14 them. So any kind of reports that were taken at  
15 the time, statements of witnesses, known factors  
16 that were documented; things like any kind of  
17 description, verbal description, that the  
18 witness was able to give of the perpetrator; any  
19 statements that a witness might have made about --  
20 early on about their viewing conditions.

21 You're looking for consistency  
22 across time in those documents and basically  
23 trying to create convergence on anything that  
24 bears on the reliability. So early statements,  
25 police reports, other kinds of reports,

1 depositions, materials, like if there were  
2 photos involved, and so any kind of -- I'm  
3 always asking for any kind of document that can  
4 bear on any of those questions.

5 Q. So say you have a situation where a  
6 crime occurs and it's some time before the  
7 actual ID is made, but throughout that course  
8 the witness is showed various pictures. So, you  
9 know, like at Point A in time the witness is  
10 showed a couple of pictures. Then Point B the  
11 witness is showed another couple of pictures and  
12 either says she thinks it's the person or maybe  
13 it's not the person. Is that relevant to  
14 assessing the ID?

15 A. Yes.

16 Q. How important is that to your analysis?

17 A. Well, it's quite important. I mean,  
18 and you have to -- you have to -- you have to  
19 look at all of the eyewitness' behaviors that  
20 are relevant to the issue of that witness'  
21 ability to make an identification.

22 Q. Well, why is prior exposure to  
23 photographs or lineups and things like that, why  
24 is that relevant to the analysis?

25 A. Well, you want to know things like --

1 I mean, you're always on the lookout for  
2 questions like had this witness been previously  
3 exposed to a photo that was then later used,  
4 which could be construed as suggestive. You're  
5 looking for whatever information happens to be  
6 present in those -- in those procedures.

7 Q. And in that case you would look at all  
8 of the photographs, if they're available to you?

9 A. If they're available.

10 Q. And then do you ever interview or meet  
11 the victim or suspect?

12 A. No.

13 Q. So it's purely based on documents and  
14 video transcripts of -- or videotapes of  
15 deposition transcripts and things like that?

16 A. Yes.

17 MS. ROMEO: Do you guys want to  
18 take a short break? I think we've been going  
19 for about an hour and a half, so, yeah, let's  
20 take a short break.

21 (A recess was taken.)

22 MS. ROMEO: All right. So we are  
23 back on the record after taking a short break.

24 Q. Let's go back to, I have a couple of  
25 questions going back to your professional

1 background. I see that you have had a number of  
2 consulting positions over the years. Can you  
3 tell me what kind of work you've done in that  
4 regard?

5 A. Well, I don't know if I would call  
6 them consulting positions. I mean, they are  
7 mostly post-Ph.D. It's been consulting on  
8 specific projects or on specific cases as well  
9 as things like -- I guess my position as  
10 director of social sciences for the Center of  
11 Forensic Science and Public Policy could be  
12 called a consulting position, but it largely  
13 revolves around trying to initiate specific and  
14 execute specific projects.

15 Q. And what kind of projects?

16 A. Well, the primary one, for example,  
17 for the American Judicature Society was to  
18 conduct field experiments on eyewitness  
19 identification in conjunction with the police  
20 departments in San Diego; Tucson; Austin, Texas;  
21 and Charlotte, North Carolina.

22 Q. And are those active projects or are  
23 these projects that you've already worked on?

24 A. The data is all collected. We have  
25 done certain analyses and released those, and

1 we're continuing to analyze those cases in  
2 greater detail.

3 Q. So what sorts of things are you  
4 looking for with these analyses?

5 A. Well, the primary driving -- the  
6 primary measures we're looking at for every  
7 lineup that these police departments did over a  
8 period of time, developing careful records, we  
9 had an explicit protocol that we trained all the  
10 detectives in to analyze how often witnesses  
11 pick fillers in lineups, known innocent suspects  
12 who are just in the lineup to fill it out,  
13 versus how often they pick the suspect that the  
14 police had in the lineup versus how often they  
15 make no identification at all.

16 Q. Are these based on actual crimes?

17 A. Yes.

18 Q. What kind of crimes?

19 A. All over the place. Robbery would be  
20 the most common one, but there's some murder  
21 cases in there. Assault cases. An assortment.

22 Q. Are they all cases of crime in the  
23 United States?

24 A. Yes.

25 Q. And do any of the crimes touch upon

1 any kind of terrorist acts?

2 A. There are victims in there. They're  
3 being terrorized, but I don't know how you  
4 define a terrorist act.

5 Q. By defining "terrorism," I mean a  
6 terrorist attack in the sense of the word that a  
7 crime is committed to inflict terror and fear on  
8 a random number of people.

9 A. No, none of these cases would be like  
10 that.

11 Q. And are any of these crimes that  
12 occurred in conflict zones, what we talked about  
13 earlier?

14 A. In what?

15 Q. Conflict zones, what we talked about  
16 earlier.

17 A. No. I think that San Diego might  
18 consider some of its neighborhoods to be  
19 equivalent of conflict zones, but no.

20 Q. Generally speaking, though, you  
21 wouldn't equate the United States and the Middle  
22 East as similar conflict zones?

23 A. As similar conflict zones?

24 Q. Yes.

25 A. No.

1 Q. And are all of these projects that  
2 you're talking about, are they all disclosed on  
3 your C.V. or is there anything after June 2013  
4 that you would need to add?

5 A. There's nothing with regard to those  
6 after June '13 that would be added, no.

7 Q. And I see that you have also received  
8 various research grants from the National  
9 Science Foundation?

10 A. Yes.

11 Q. Can you tell me about those research  
12 projects?

13 A. Well, the National Science Foundation  
14 is the primary government funding of scientific  
15 research in the United States and funds some  
16 scientific research in other countries too, but  
17 for physics, chemistry, all the sciences,  
18 including the social sciences, and so they have  
19 consistently funded my research to study  
20 eyewitness identification.

21 Q. And what sorts of research projects  
22 have you undertaken with those grants?

23 A. Well, primarily those grants are for  
24 controlled experiments where we create events  
25 for -- that people view, and then we follow up

1 those events and those viewings with questioning  
2 the people about what they saw, doing lineups,  
3 and then we systematically manipulate variables  
4 to see how it increases them and decreases their  
5 reliability.

6 Q. So would you say that the main purpose  
7 of these studies are to identify various variables  
8 that may increase or decrease the likelihood of  
9 a reliable identification?

10 A. Yes. And that would increase or  
11 decrease false certainty. A number of the  
12 things that the National Science Foundation have  
13 funded me for to look at, how false certainty is  
14 created. False certainty is simply where a  
15 witness is mistaken, but they nevertheless are  
16 certain or positive that they're right.

17 Q. What's the relevance of a witness  
18 picking nobody from a lineup?

19 A. What's the relevance of it?

20 Q. Yeah, or a show-up, for instance.

21 A. The relevance of it. That's a pretty  
22 broad question.

23 Q. How is it relevant to the analysis of  
24 assessing the ID?

25 A. Well, there's more than one kind of



1 nonidentification. What you're talking about is  
2 in a broad category called nonidentifications.  
3 And one kind of nonidentification is what we  
4 call a rejection, so that's where, for example,  
5 a witness might look at a lineup and say  
6 definitively it's none of these people.

7 There's another kind of  
8 nonidentification where a witness might say --  
9 which we call more of a not-sure category where  
10 the witness doesn't pick anyone, but they're not  
11 saying it's none of these people. They're just  
12 not -- they're just -- either they might be  
13 wavering back and forth between some people and  
14 they don't pick someone because they can't  
15 discriminate between the two or because they  
16 just don't have a good enough memory, and they  
17 know it, to try to make an identification.

18 Q. What does rejection, whether it's  
19 absolute or -- and you can take it one by one.  
20 Whether it's absolute or uncertainty, what does  
21 rejection tell you about the witness' memory?

22 MR. SATIN: Objection. Vague.

23 A. Well, a true rejection where the  
24 person says it's none of these, confidently says  
25 it's none of these, can indicate any number of

1 things. I mean, one of the things it can  
2 indicate is it can indicate that the witness has  
3 a good enough memory to reject them all.

4 Another possibility is that the  
5 same thing will happen, though, even if a  
6 witness has a very weak memory, but what you're  
7 showing them are individuals who are so discrepant  
8 from even -- from what little memory they have,  
9 that they can confidently reject them.

10 So, for instance, maybe all you  
11 remember is that this person, you know, had sort  
12 of a round face and all the photos that you're  
13 shown are really skinny faces. You may not be  
14 able to distinguish between one round-faced  
15 person and another, but you can still reject all  
16 of the skinny faces.

17 Q. But what does that tell you about the  
18 witness' memory? Does it tell you that the  
19 chances of the witness' memory being -- does it  
20 increase the chances of the witness' memory as  
21 reliable or does it decrease the chances of a  
22 witness' memory being reliable?

23 A. Well, I don't think -- I don't think  
24 the -- well, what it tells you is that -- I  
25 mean, well, it depends. I mean, it depends on

1 the circumstance. I mean, in the kind of case I  
2 was just talking about where, you know, you  
3 remember the face being sort of round, I mean,  
4 it's reliable at the level of you knew it was a  
5 round face, but that's all. You know, so you  
6 rejected on the basis of some very partial kinds  
7 of information in which case that doesn't tell  
8 you much about reliability.

9 It can under certain circumstances  
10 increase the reliability of a witness if they  
11 totally reject some highly plausible possibilities  
12 and reject an entire set, but reliability is based  
13 on a lot more considerations than just that.

14 Q. But in any event, you would consider  
15 this in assessing the reliability of an ID?

16 A. You would if you -- if you had all the  
17 information that you needed to have. I mean, if  
18 you had enough information about it, you would  
19 take it into consideration.

20 Q. How much information do you think you  
21 would need?

22 A. You would want -- you would want all  
23 the photos, and you would want to know -- you  
24 would want some clear and unambiguous record of  
25 exactly what the witness said.

1 Q. What if you were missing one of those  
2 things? Would you not assess it?

3 A. Well, you would -- you would start  
4 relying more on other things to assess  
5 reliability, I mean.

6 Q. Right.

7 But would you still discuss that?  
8 Would it be noted in analysis?

9 A. If you had -- if you had enough  
10 information about it, it would, yes.

11 Q. If you knew that there had been a prior  
12 identification procedure, even if you didn't have  
13 all of the photos and some clear record, is that  
14 not still relevant to mention in assessing the  
15 ID even if you state there isn't sufficient  
16 information?

17 A. It could be.

18 Q. Generally speaking, when you decide  
19 how to assess an ID, do you discuss all of the  
20 factors that are relevant, regardless of whether  
21 there is support, or do you simply exclude  
22 factors that are relevant but for which there  
23 are no support?

24 A. Well, I mean, if you have -- if you  
25 have enough information to have some confidence



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1 in what you think happened, then you would bring  
2 it into the analysis, yes.

3 Q. But even knowing the pure facts that  
4 that -- that a nonidentification occurred, even  
5 if you can't assess it, isn't that still relevant  
6 to whether the ID is reliable or not?

7 A. It could have relevance.

8 Q. So the conclusion at the end of the  
9 day if there isn't supporting information would  
10 technically be incomplete?

11 A. Would technically be incomplete if --

12 Q. What I'm wondering is, if there are  
13 relevant factors --

14 A. Uh-huh.

15 Q. -- and there are certain things that  
16 you decide aren't going to factor in here  
17 because of supporting evidence, is it still your  
18 professional opinion that you can render an  
19 opinion on the identification, the reliability?

20 A. Depending on the level of all the  
21 other factors that you did consider, yes.

22 Q. So going back to your expert testimony  
23 for a moment, have you ever not been qualified  
24 by a Court on the basis of your credentials?

25 A. I think that's possible, but -- like

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1 I've been told about some old case, that  
2 somewhere in the record there's something that --  
3 in a criminal case that I was not allowed to  
4 testify on; but as far as I can tell, I didn't  
5 even know about the case. It was a defense  
6 attorney who wanted to call me, told the judge  
7 what he thought I would say, but I don't -- I  
8 have no recollection.

9 Q. You weren't retained for that case?

10 A. No. But somehow my name got in the  
11 record --

12 Q. Oh.

13 A. -- because the attorney said, "This is  
14 who I want to call."

15 Q. Do you have any idea what the case  
16 name is for that?

17 A. I don't. I don't remember.

18 Q. Approximately what year it was?

19 A. Oh, it would have been in the -- it  
20 would have been late '80s, early '90s, I think.

21 Q. So to the best of your recollection,  
22 that's the only case that you've never been  
23 qualified for is a case for which you were not  
24 even retained?

25 A. That's the only case I can recall.

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1 There was a -- there was a civil case for the  
2 plaintiffs in Texas a couple years ago where I  
3 did not testify, but I did not testify because  
4 it had nothing to do with my qualifications or  
5 the admissibility per se, but rather because it  
6 was considered cumulative; because a police  
7 practices expert preceded me on the stand, and I  
8 was going to be saying pretty much the same  
9 things, at least in the mind of the judge.

10 Q. Do you remember the case name?

11 A. It's probably on this list. Yeah, I  
12 think -- I believe it would have been the  
13 Sifuentes and Ramirez versus Abreo, a Texas  
14 case.

15 Q. Got it. So that's on page 2 of your  
16 report?

17 A. Yes.

18 Q. In 2011?

19 A. Yes.

20 Q. Taking a look at your --

21 A. So all I list here is the deposition,  
22 not testimony, because it didn't result in  
23 testimony.

24 Q. Right.

25 So looking at this list from page

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1 1 to 2 --

2 A. Yeah.

3 Q. -- you typically only give deposition  
4 testimony; is that right?

5 A. It's pretty common for these things to  
6 settle out of court.

7 Q. So you don't typically in these cases  
8 then actually testify at trial?

9 A. No. I mean, I have. I did in  
10 Washington/Yancy and Galindo versus O'Donnell.

11 Q. So that's approximately like two cases  
12 out of 15; right? See how many you have here.

13 A. I guess that would be right.

14 Q. 14. So 14 cases are listed here since  
15 2008, and it looks like two --

16 A. Three, I think.

17 Q. Three. So three out of 14 cases  
18 actually resulted in trial testimony.

19 Do you know if that's because all  
20 the cases settled or is it because your report  
21 was excluded?

22 MR. SATIN: Objection. Calls for  
23 speculation and lack of foundation.

24 A. I don't think my report was excluded  
25 in any -- in any of the cases. There was the

1 one that I mentioned that the judge ruled it  
2 would be cumulative, but I don't believe it's  
3 been excluded in any -- in any case, no.

4 Q. So you don't believe that you've ever  
5 had a report that's been excluded in all of the  
6 expert testimony that you've given?

7 A. Not that I'm aware of.

8 Q. And you're also not aware of not being  
9 qualified in any of these cases as well?

10 A. No.

11 Q. Has your testimony ever been limited?

12 MR. SATIN: Objection. Calls for  
13 speculation. Lack of foundation.

14 A. You know, I don't -- I don't -- I'm  
15 not sure. Certainly I think that there have  
16 been times in which perhaps an attorney said  
17 don't -- you know, might have said something  
18 like the judge won't allow you to, for example,  
19 reach a conclusion about the innocence or guilt  
20 of the defendant, which he didn't need to tell  
21 me because I knew that and I always presume  
22 that. So maybe there was a discussion of that  
23 and a judge made a ruling like that, but I don't  
24 know.

25 Q. Have you ever rendered an opinion that

1 touches upon the guilt or innocence of a  
2 suspect?

3 A. Only at a -- in a very constrained  
4 fashion of saying that this evidence would not  
5 in itself be, for example, indicative of guilt,  
6 but the question -- but that's not speaking to  
7 the ultimate issue of innocence or guilt,  
8 because there could be other evidence.

9 Q. Right.

10 But do you qualify your statement  
11 in your reports?

12 A. Yes. I'm only speaking about the  
13 identification itself, not the other evidence.

14 Q. To your knowledge, has a Court ever  
15 rejected your opinion?

16 A. "Rejected," what does that --

17 MR. SATIN: Objection. Vague.

18 A. What does that mean?

19 Q. Rejected your assessment of the  
20 reliability of an ID?

21 MR. SATIN: Objection. Calls for  
22 speculation.

23 A. How would they do that?

24 Q. If you present testimony that an ID is  
25 unreliable and that it is thereafter rejected

1 and not presented to the jury.

2 A. Not that I'm aware of.

3 Q. Have you ever testified in court?

4 A. Oh, yes.

5 Q. Before a jury?

6 A. Yes.

7 Q. And tell me about that kind of  
8 testimony. What do you tell the jurors?

9 MR. SATIN: Objection. Vague.

10 A. Well, it's pretty straightforward. I  
11 mean, it always starts off with, you know, the --  
12 my qualifications, and then it's often asked in  
13 the form of a common -- it varies. I mean, it  
14 varies. This is a big country, so there's all  
15 kinds of different practices across the country.

16 The fairly typical practice is to --  
17 is for the attorney who retained me on direct to  
18 begin to ask me about some general principles of  
19 memory and eyewitness identification, and then  
20 in many cases they're restricted to kind of the  
21 hypothetical. So, you know, suppose, and it's a  
22 hypothetical, as opposed to describing the  
23 specifics of that particular case.

24 But other times they'll ask about  
25 the specifics of the case; and so, for example,

1 they may bring forward exhibits like a  
2 photographic lineup and had I seen this before  
3 and do I see problems with this particular one.  
4 You know, what would be a proper instruction  
5 before a witness was given something like this;  
6 what happens if the proper -- if that instruction  
7 is not given, you know, and so on and so forth.

8 Q. So you noted that there's sometimes  
9 a distinction between testimony on general  
10 principles as opposed to testimony on the specific  
11 circumstances affecting a particular ID at issue  
12 in the case?

13 A. Right.

14 Q. Is that correct?

15 A. Right.

16 Q. Now, that distinction, does that depend  
17 on whether the case is civil or criminal, in  
18 your experience?

19 A. I think so. I think that in my  
20 experience that's not much of a consideration or  
21 concern of the Court for civil cases, but is  
22 more so for criminal cases, depending on the  
23 jurisdiction.

24 Q. When you say is "not much of a  
25 consideration," can you just explain to me what

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1 you're referring to? What's the consideration  
2 that you're talking about?

3 A. Well, in a civil case it's fairly  
4 common to be talking about the specifics of that  
5 particular case, circumstances of that particular  
6 case. So questions about, you know, what my  
7 understanding was of, let's say, the distance of  
8 viewing that was involved or the lighting or  
9 what my view was of the specific way in which  
10 the -- in which this particular photographic  
11 lineup was conducted, even referring to individual  
12 names of detectives and witnesses and so on. So  
13 it's not hypothetical at all. It's the specifics  
14 of that case.

15 Q. But in these civil cases, these are  
16 cases where the conviction is already known to  
17 be overturned; correct?

18 A. Yes.

19 Q. So the ID is already known to be  
20 inaccurate for one reason or another?

21 A. Yes, although sometimes defendants don't  
22 admit that.

23 Q. Regardless, the conviction was actually  
24 overturned?

25 MR. SATIN: Objection. Asked and

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1 answered.

2 Q. Correct?

3 A. Right.

4 Q. So there was reason to believe that  
5 the ID was, in fact, inaccurate?

6 A. Right.

7 Q. And in the criminal cases, the whole  
8 point of the proceeding is to determine whether  
9 the defendant committed the crime; correct?

10 A. Right.

11 Q. And in those situations you've seen,  
12 at least in some jurisdictions, that testimony  
13 has been limited just to general factors  
14 affecting the ID or hypothetical; is that  
15 correct?

16 MR. SATIN: Objection. Lack of  
17 foundation, calls for speculation.

18 A. In some jurisdictions, yes.

19 Q. And even speaking more broadly than  
20 your own personal experience, are you aware that  
21 that's the case with respect to other experts in  
22 your field?

23 MR. SATIN: Objection. Vague.

24 A. Other experts tell me that sometimes  
25 they can talk about the very specifics and

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1 sometimes it just works through the  
2 hypothetical.

3 Q. Is that in criminal cases or are  
4 they --

5 A. Right.

6 Q. -- speaking about civil cases?

7 A. Criminal.

8 Q. So have you ever been the victim of a  
9 crime?

10 A. Just property crimes.

11 Q. And have you had to ever make a later  
12 identification?

13 A. No.

14 Q. Have you ever been a victim of a  
15 terrorist attack?

16 A. No.

17 Q. Or of a crime that occurred in a  
18 conflict zone?

19 A. No.

20 Q. Generally speaking, have you ever had  
21 to make an identification after experiencing  
22 fearful or stressful conditions?

23 A. No.

24 Q. And have you ever been to Israel?

25 A. No.

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1 Q. Do you speak Hebrew?

2 A. No.

3 Q. Have you ever been to West Bank?

4 A. No.

5 Q. Or Gaza?

6 A. No.

7 Q. Do you speak Arabic?

8 A. No.

9 Q. Do you have any experience with  
10 terrorism-related subjects?

11 MR. SATIN: Objection. Vague,  
12 undefined term.

13 A. No.

14 Q. Have you ever studied terrorism  
15 generally?

16 A. No.

17 Q. And typically speaking, over the  
18 course of your career in the research that  
19 you've conducted on eyewitness IDs, if you had  
20 to, what crime have you studied the most?

21 A. What crime have I studied the most?

22 Q. In the context of eyewitness  
23 identifications.

24 A. Well, I don't think that there's -- I  
25 mean, I've looked -- you know, my source of data

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1 and materials for analysis runs a broad gamut  
2 from the controlled laboratory studies, for  
3 example, that are funded by the National Science  
4 Foundation to the DNA exoneration cases to what  
5 we refer to as field studies of eyewitnesses in  
6 both victims and bystanders in ongoing criminal  
7 investigations.

8 The DNA exoneration cases are  
9 primarily cases that involve sexual assault, not  
10 exclusively or primarily, because that's where  
11 the DNA is. The field studies, though, are a  
12 broad spectrum -- we talked about that before --  
13 where they include all kinds of crime.

14 Q. And how do controlled laboratory  
15 studies differ from the field studies?

16 A. The principal way in which they differ  
17 is because -- is that we create the event so we  
18 know exactly what happened.

19 Q. In which one?

20 A. The lab studies.

21 Q. Okay.

22 A. So we know who the perpetrator is. We  
23 can systematically then include the perpetrator  
24 in a lineup, not have the perpetrator in a  
25 lineup. We can -- you know, we have this power

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1 over ground truth, which is what -- which is  
2 what is appealing to the National Science  
3 Foundation, that we know the actual answer. We  
4 don't have to guess.

5 Q. But in these studies you're typically  
6 testing for one factor; is that right?

7 A. Well, we manipulate a variable at a  
8 time, yes. We try to hold everything else  
9 constant. So, for instance, if we're looking  
10 at, let's say -- the prelineup instruction  
11 factor is very important. Prelineup warning to  
12 witnesses that the person might not be here,  
13 that in police parlance this is often referred  
14 to as the prelineup admonition. The person who  
15 you saw might not be here. That it's just as  
16 important to exclude the innocent from suspicion  
17 as it is to incriminate the guilty. The correct  
18 answer might be none of the above.

19 What we do in our experiments then  
20 is we'll -- if we're interested in that variable,  
21 is that that's the only -- that's the focal  
22 variable. That's the thing that we manipulate,  
23 so we hold other things constant in a study like  
24 that.

25 Q. In an actual crime, is there one focal

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1 variable that takes precedence over all others?

2 A. No.

3 Q. So what is your professional opinion  
4 on how far lab study results can go in terms of  
5 identifying a reliable or unreliable ID?

6 A. Well, they identify factors that  
7 increase and decrease reliability.

8 Q. But, for instance, you don't just --  
9 so say you have an ID. You don't just start at  
10 a hundred percent of potential accuracy and then  
11 say this study showed X variable can increase  
12 the likelihood of the unreliability of an ID, so  
13 therefore, we're going to knock down the 100  
14 percent to 75 percent. That's not how it works;  
15 is that right?

16 A. Well, you're never starting at a  
17 hundred percent. I mean, you always have a  
18 comparison condition, a so-called control  
19 condition; right? And, you know, it's more  
20 likely to be, you know, in the -- let's say  
21 when the perpetrator is present, maybe 70  
22 percent of the time they're able to pick him  
23 out; and when he's absent, they're still  
24 choosing somebody, you know, 30 percent of the  
25 time. So you're starting there. You manipulate

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1 some variable and you see what happens to those  
2 numbers.

3 Q. Okay. Well, I'll clarify my question.  
4 My question is, taking the study, the results of  
5 the study, after you've done the manipulation  
6 and you've yielded various percentages of  
7 increasing or decreasing the reliability.  
8 Taking that percentage --

9 A. Uh-huh.

10 Q. -- and taking an actual real-world ID  
11 and then saying because this factor was present  
12 in this situation, we're going to now knock it  
13 down 25 percent or we're going to knock it down  
14 50 percent, depending on the severity of the  
15 condition, my question is, does that work?

16 A. No, not really. I mean, what you know  
17 is the direction that it's going, but to -- but  
18 to assume that the -- to assume that you can  
19 quantify that at the same percentage when in the  
20 real world other things are floating around, you  
21 know, you wouldn't -- you wouldn't do that.

22 Q. And that same principle would apply to  
23 increasing the reliability of an actual ID, for  
24 example?

25 A. Right.



1 Q. And you can't just take, you know,  
2 five different studies and say five different  
3 factors yield, you know, 25 percent chance each  
4 and then just knock an ID out and say there's no  
5 way that that can be reliable. You can't do  
6 that either; is that right?

7 A. No. If we were to take a -- take a  
8 concrete example of let's say you have created  
9 these conditions where, let's say, 70 percent of  
10 the witnesses when the perpetrator is in there  
11 will pick him; and when he's not in there, it's  
12 still the case that 30 percent will pick an  
13 innocent person. Let's say that's what you  
14 start with.

15 And then let's say you add in the  
16 admonishment variable and you do little to the  
17 70 percent, but you knock that 30 percent down  
18 significantly. So what you've identified then  
19 is a factor, the admonition, that when present  
20 increases reliability by lowering those mistakes.

21 But let's suppose that you have  
22 conditions in which you start in which the  
23 acquisition of the memory, what you gave them  
24 was such a horrible view; they're greatly  
25 stressed. You wait, you know, two years before

1 you even have them attempt an ID. That variable  
2 is not going to have a huge impact. It's  
3 certainly not going to -- you know, you're not  
4 going to be -- you're never going to be starting  
5 at the original numbers. It's sort of like what  
6 we were talking about before, that horrible  
7 initial view plus the long retention interval  
8 knocks everything down so low that you're not  
9 going to be able to do much with it.

10 Q. But the point that I want to make  
11 clear for the record, though, that the social  
12 science controlled laboratory studies, the  
13 purpose of them is not to yield a mathematical  
14 formula from which you could then apply to a  
15 particular case and say there is an X percent  
16 chance that this is a reliable or an unreliable  
17 ID; is that right?

18 A. That's true. The primary purpose is  
19 to establish cause and effect.

20 Q. Right.

21 And also, there are degrees of  
22 reliability as well; correct?

23 A. Certainly.

24 Q. Can you elaborate on that? What's  
25 your professional opinion on, let's call it, the

1 sliding scale of reliability of an ID?

2 MR. SATIN: Objection. Vague.

3 A. Depends on the circumstances.

4 Q. So it can vary? Just I'm trying to  
5 gauge the level at which -- you know, when you  
6 say something is reliable --

7 A. Right.

8 Q. -- are you saying that that is  
9 reliable and it's accurate or when you say  
10 something is unreliable, are you saying it's  
11 unreliable and, therefore, cannot be correct or  
12 is there levels of gradation which go with both  
13 categories?

14 A. Well, it's all one continuum.

15 Q. Can you elaborate?

16 A. Well, you have high reliability on one  
17 end of the continuum and high unreliability on  
18 the other end of that.

19 Q. And can IDs be anywhere on this  
20 continuum?

21 A. Yes.

22 Q. So when you render your opinion on  
23 assessing the reliability of an ID, do you qualify  
24 it in that sense based on this continuum?

25 A. Do you qualify it?

1 Q. Yes, or do you -- do you qualify it?

2 MR. SATIN: Objection. Vague.

3 A. Well, yes. I mean, certainly when  
4 it's -- when it's -- when the conditions are at  
5 an extreme, you would -- you would have a  
6 statement that would be roughly associated with  
7 somewhere along that continuum.

8 Q. So generally speaking, when you render  
9 an expert opinion, how do you phrase your  
10 conclusion for whether an ID is reliable or  
11 unreliable?

12 A. You would phrase it along the lines  
13 of, you know, all of -- you know, considering  
14 all of the relevant variables that are known in  
15 this particular case, that, you know, you might  
16 say that reliability is low. You might say,  
17 depending on the circumstances, that reliability  
18 is close to zero. You might say that the  
19 circumstances are such that reliability would be  
20 high.

21 Q. How can you say that reliability is  
22 close to zero?

23 A. Well, you can say reliability is close  
24 to zero under the conditions of an accumulation  
25 of factors. I gave the example earlier, for



1 example, if it was pitch-dark, you can say  
 2 reliability would be low. As you start to get  
 3 into illumination, if illumination was low. If  
 4 you have -- if you look at things like, for  
 5 example, the witness was unable to give any kind  
 6 of meaningful just sort of beyond the generic  
 7 description of the person they saw, that's an  
 8 indication of a weak memory, and that factors  
 9 into reliability.

10 If vast amounts of time have  
 11 passed, we know, and we've known since the  
 12 earliest experiments in psychology in the 1880s,  
 13 that memory gets worse with time. And then on  
 14 top of that, if you have a procedure that is not  
 15 well-controlled where you can clearly know  
 16 exactly how that took place and that has these  
 17 various controls in it, then, you know, some --  
 18 a constellation of factors like that can lead to  
 19 a conclusion of reliability close to zero.

20 Q. Is there literature that discusses  
 21 accumulating the factors and then leading you to  
 22 a reliability of zero?

23 A. There's literature discussing --  
 24 there's literature that makes it clear that the  
 25 reliability of the end product can't be any

1 higher than the individual -- than the  
 2 reliabilities of the individual factors that  
 3 went into it, so, yes, they cumulate.

4 Q. So then is it your position that the  
 5 lab studies which control for one factor and  
 6 yield a certain result, then you can use those  
 7 to knock down the reliability or increase the  
 8 reliability of an ID?

9 A. Yes.

10 Q. So can you walk me through what the  
 11 formula would be? I mean, is there a generally  
 12 accepted percentage to knock down an ID for --

13 A. No, because you --

14 Q. -- darkness?

15 A. For darkness?

16 Q. Yeah. So say the witness -- say  
 17 it's nighttime. Is there a generally acceptable  
 18 percentage that you can knock down the reliability  
 19 of an ID?

20 A. Well, no. I mean, we know where -- we  
 21 know where vision stops operating. We know --  
 22 and there are formulas. If you can get out and  
 23 measure the lighting that existed at the time,  
 24 then we know how to -- and, you know, it's not  
 25 just a matter of measuring the lighting. It's

1 complex. It can be done, but the problem  
 2 that -- because you have to know something about  
 3 the reflection of the object, right, so darker  
 4 objects are going to reflect less than lighter  
 5 objects and so on and so forth. If you have all  
 6 that information, yes, you could calculate that.

7 Q. So you could calculate that and then  
 8 take a particular ID and say it is now 25 percent  
 9 less reliable because of the lighting conditions?

10 A. You can -- you can match it to human  
 11 performance under those conditions and show  
 12 that, for example, that it knocks the ability to  
 13 accurately identify a person under those  
 14 circumstances down by X percent, but you'd have  
 15 to recreate all those conditions.

16 Q. Are there studies that you can point  
 17 me to that discuss this?

18 A. That discuss lighting?

19 Q. Yeah, as one example, or any of the  
 20 other factors that if you recreate the  
 21 situation, you can knock it down by X percent?

22 A. Well, I think the best work on that  
 23 was done by Goeff Loftus, and the -- and what  
 24 he's done is shown with respect to distance,  
 25 which is a cleaner variable, that there is a

1 very precise relation between distance and  
 2 between the witness and the target that directly  
 3 relates to percentage accuracy scores.

4 Q. And in your analysis do you cite to  
 5 these studies to support your conclusions about  
 6 the various factors that are at issue in the ID  
 7 here?

8 A. I don't talk about distance in my  
 9 report.

10 Q. Well, you were saying that this could  
 11 happen with various factors.

12 A. Right.

13 Q. So generally speaking, in your report  
 14 in this case do you cite to studies that support  
 15 the reduction of reliability of the ID being  
 16 reliable by a certain percentage?

17 A. No. As I indicated, we don't presume  
 18 that these exact percentages are comparable from  
 19 one set of circumstance to another. We're  
 20 looking at the direction that these variables go.

21 Q. So you can't actually reduce the  
 22 accuracy -- or you can't actually reduce the  
 23 given reliability or unreliability of any  
 24 actual-world ID by using these controlled  
 25 study results?

1 A. Well, you can reduce it. You just  
2 don't -- you can't say that it reduced it by  
3 27.6 percent versus some other number.

4 Q. So then how do you reduce it? So if  
5 the controlled laboratory studies yield results  
6 that you can use to knock the percentage down --

7 A. Uh-huh.

8 Q. -- but then you can't knock it down by  
9 a specific percentage, how do you knock down the  
10 percentage?

11 A. How do you knock down the percentage?  
12 Well, I think you'll notice there are no  
13 percentages in here.

14 Q. So then what's the basis for -- so why  
15 don't you explain to me the basis for assessing  
16 these relevant factors and how they're supported  
17 by the research.

18 A. That these factors cumulate. They  
19 cumulate in a particular direction that when  
20 considered together, bring reliability down  
21 close to zero.

22 Q. But how can you say they accumulate to  
23 bring reliability down close to zero? How do  
24 you get to zero? You have to be starting from  
25 somewhere.

1 A. Well, no, I disagree. You don't have  
2 to be starting from somewhere. For example, you  
3 wouldn't take the retention factor, let's say,  
4 that -- you know, all of this time that passed  
5 between the event and the identification, and  
6 say that that's knocking things down by 60  
7 percent, because you might have started off with  
8 circumstances that would only be 10 percent, so  
9 you can't end up with a negative number.

10 We know that, for example, in the  
11 absence of a long passage of time, so, for  
12 example, even identification procedures that  
13 happen twenty-four or forty-eight hours later,  
14 that there are -- that there could be huge  
15 reliability problems. So longer delay just  
16 contributes to that, knocks it down further.

17 Q. So what if you have two factors that  
18 indicate unreliability and you have three  
19 factors that indicate reliability, how does that  
20 affect the probability that a given ID in an  
21 actual case is reliable or not reliable?

22 A. Well, you'd have to -- you'd have to  
23 consider what those factors are.

24 Q. Is it your position that you can take  
25 those factors and you can adjust the probability

1 upward and downward to then potentially get to a  
2 zero chance of possibility?

3 A. Well, yeah, I mean, you could get to  
4 zero chance of -- or near zero chance of  
5 reliability from considering one factor no matter  
6 what all the other factors are.

7 Q. How do you accumulate these factors  
8 with consistency amongst various actual cases,  
9 real-world cases?

10 A. I'm not sure I understand.

11 Q. So I'll rephrase.

12 Is it your professional opinion  
13 that a result of a study can be generalized with  
14 consistency across victims of crime?

15 A. Well, you know, victims can differ in,  
16 for example, visual acuity, so there certainly  
17 are factors that can account for differences  
18 between witnesses all exposed to the same  
19 situation.

20 There are other circumstances in  
21 which situations are so powerful that they leave  
22 no room at all for individual differences. I  
23 keep coming back to the kind of extreme example,  
24 but, I mean, no one can see in the dark. We  
25 know that. Doesn't matter if you're from the

1 Middle East or whatever; right? And I'm not  
2 saying that's a factor in this case. I'm just  
3 saying -- I'm just throwing out an example of a  
4 variable to the question to show kind of an  
5 extreme.

6 So no matter in that case, doesn't  
7 matter what your visual acuity is. Doesn't  
8 matter whether you were looking. Doesn't matter  
9 whether you were trying to pay close attention  
10 or not pay close attention.

11 Q. So let's take the visual acuity  
12 difference, okay? So let's say you have a  
13 study and it says, you know, ID's -- I'm going  
14 to keep using 25 percent. Let's just say for  
15 general visual acuity, opportunity to view the  
16 perpetrator, say the person is across the  
17 table from you, okay? In that situation you  
18 manipulate the variables and you get a 25 percent  
19 chance that you can knock down the reliability  
20 of an ID.

21 If people have different visual  
22 acuities -- I have glasses on right now. She  
23 doesn't, right -- can you generalize that result  
24 of that study to predict my identification of  
25 you as well as my colleague's identification of

1 you?

2 MR. SATIN: Objection. Vague.

3 Q. How would you adjust for the visual  
4 acuity difference?

5 MR. SATIN: Objection. Vague.

6 A. Well, we don't adjust for visual  
7 acuity differences. We look at how some  
8 variable affected the general population of  
9 people who were tested. In our -- in our  
10 studies we only use people who have good visual  
11 acuity. If they have to wear -- if they have to  
12 wear glasses, they have to be wearing the  
13 glasses at the time and so on. So we -- you  
14 know, people who have poor visual acuity, you  
15 know, things just get worse, that's all.

16 Q. So is it your opinion that you can  
17 adjust factors affecting the reliability of an  
18 ID upward or downward, in a particular case an  
19 actual ID and not in the context of a controlled  
20 laboratory study, even though there's no  
21 mathematical formula that you can refer to?

22 MR. SATIN: Objection. Vague.

23 A. Yes.

24 Q. So is the jury just supposed to take  
25 your word for it if they don't have supporting

1 studies to show the percentages?

2 MR. SATIN: Objection. Calls for  
3 speculation and legal conclusion.

4 A. Well, there are plenty of supporting  
5 studies all of which report percentages. They  
6 report the magnitude and direction of the effect  
7 observed.

8 Q. But what about your generalization of  
9 those studies to an actual ID, the mathematical  
10 formula that you would use to yield the  
11 reliability of the ID in a particular case?

12 A. Well, there is no mathematical  
13 formula, and any testimony that I would give to  
14 a jury, you know, the jury can do with it whatever  
15 they want. They take it into consideration, and  
16 it goes to weight.

17 Q. But if you've already said that  
18 there's a zero, near-zero chance of reliability,  
19 haven't you already done the work for them?

20 A. No, because that's opinion testimony.  
21 It's an expert opinion testimony, but it's still  
22 opinion testimony.

23 Q. But isn't the jury relying on you to  
24 provide them with the information necessary to  
25 make such a judgment?

1 MR. SATIN: Objection. Calls for  
2 speculation.

3 A. If the Court admits the testimony,  
4 it's up to the jury to decide the credibility of  
5 every witness.

6 Q. Is there a single agreed-upon rate of  
7 misidentification in the literature?

8 MR. SATIN: Objection. Vague.

9 A. There's -- well, yes and no.

10 Q. Let's start with the yes.

11 A. Okay. The yes comes from the field  
12 studies of eyewitness identification in criminal --  
13 actual criminal cases. Witnesses are not a part  
14 of a study per se or whatever. These are ongoing  
15 criminal cases in which we know that there's  
16 pretty good consistency here that one out of  
17 every three times that a witness makes a pick,  
18 they pick a known innocent filler.

19 Now, about one of every -- well,  
20 about -- almost one of every two -- well, and  
21 then the rest of the time, so about two out of  
22 every three times, they'll pick the suspect. We  
23 don't know how often they're wrong when they  
24 pick the suspect. Obviously in every DNA  
25 exoneration case they were wrong in picking the

1 suspect.

2 But so that establishes sort of  
3 this idea of a minimal estimate of a level of  
4 unreliability. One out of every three picks we  
5 know are wrong. The actual number has to be  
6 higher than that for a number of reasons, but  
7 one out of every three we know are wrong.

8 Q. What number of reasons?

9 A. Some of the picks of suspects are  
10 wrong too. We just don't know it. Also, some  
11 of these -- in some of these studies, the  
12 suspect in a lineup stands out. It's biased  
13 against the suspect. Stands out more than the  
14 others. And so by estimating how often they  
15 pick the others, we're kind of underestimating  
16 how often if the person was innocent they would  
17 have -- if the suspect is innocent, they would  
18 have picked him because they'll load up on that.

19 And then in some of the archival --  
20 some of these archival studies, the police have  
21 more than one suspect in the lineup in which  
22 case you can't pick a filler, and so that  
23 underestimates in those cases how often the  
24 witnesses were in error.

25 Q. This single rate of misidentification

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1 that you're talking about, before you said field  
2 studies. Is that the same thing as an archival  
3 study or are those two different things?

4 A. Well, there are more than one kind of  
5 field study. Archival studies are where you go  
6 into the police department records. You're  
7 looking for every instance that you can find in  
8 which they did a lineup, so they're retrospective.

9 There's another type of field study,  
10 the type that we've done, where it's prospective.  
11 In other words, what happens is you don't allow --  
12 you're collecting every -- you're collecting data  
13 on every lineup as it happens as opposed to going  
14 back into the detective's files.

15 The problem with going back into  
16 the detective's files is that -- and we just did  
17 a national survey of law enforcement agencies in  
18 the U.S. 37 percent of law enforcement agencies  
19 in the U.S. admit, which was an amazing admission,  
20 that they don't write up reports when the witness  
21 doesn't pick their suspect. So those tend to be  
22 missing from a lot of the case files, and it's  
23 one of the reasons why we do prospective studies  
24 where we will not allow them to misrecord  
25 anything.

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1 Q. So is your statement that one out of  
2 every three IDs will be a pick of an innocent  
3 filler and that two out of three will be a pick  
4 of the suspect, is that based on the field  
5 studies or the archival studies and its --

6 A. It's based on --

7 Q. Yeah.

8 A. It's based on an accumulation of all  
9 those into one database.

10 Q. So it's just statistics?

11 A. Yes.

12 Q. And you said that there was a yes and  
13 no to the question of is there a single rate of  
14 misidentification.

15 A. Right.

16 Q. So what's the no?

17 A. Well, the no is just simply that the  
18 rate of misidentification is a moving target, and  
19 it's a moving target because how you -- because  
20 of a number of things. One is we believe that  
21 the rate of misidentification has been lower in  
22 recent years than it was before, and the reason  
23 is because we've been pressing law enforcement  
24 agencies very hard to use better procedures and  
25 also because a significant, although definitely

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1 not thorough, penetration into the police  
2 departments on our part have made them much more  
3 aware of the dangers of putting together an  
4 identification procedure prematurely.

5 So what happens is that a lot of  
6 agencies have operated in a way that, you know,  
7 just on a hunch maybe it's Joe, and so they  
8 throw Joe in a lineup. And when you do that,  
9 you have -- because it was just a hunch, there's  
10 a good chance you're showing a witness a  
11 culprit-absent lineup, and that's when bad  
12 things start to happen. We're trying to get  
13 them to make sure that you have clear evidence  
14 against somebody before you put them into a  
15 lineup.

16 Q. Can you just define the term "culprit-  
17 absent lineup"?

18 A. Yeah. It's where, you know, you have,  
19 let's say, a detective who thinks that maybe,  
20 you know, Joe committed this robbery, so gets  
21 maybe a photo of Joe and some filler photos.  
22 Calls in the witness; but, in fact, it turns out  
23 it wasn't Joe at all. You know, it was some guy  
24 Sam who is still at large. You're showing the  
25 witness a perpetrator-absent lineup.

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1 Q. So in your report you say that there  
2 is no single rate of mistaken identification,  
3 but instead the rates vary as a function of a  
4 large number of variables relating to the  
5 various stages that we talked about.

6 A. Right.

7 Q. So do you really mean yes and no to  
8 the first part of that sentence, there is no  
9 single rate of mistaken identification?

10 A. I do mean yes and no. I told you what  
11 I meant by yes, namely that if by that we mean --  
12 if by single rate of misidentification we mean,  
13 you know, considering all the things that vary  
14 out there in the real world, right, and the cases  
15 that police are dealing with, right, what's that  
16 rate minimally of misidentification versus, yeah,  
17 if we wanted to -- you know, if we were to do  
18 certain things, the rate would go up; do other  
19 things, the rate would go down. In certain  
20 kinds of cases, that rate's going to be higher  
21 than others.

22 Q. Do you explain this in your report? I  
23 just don't remember reading that there's a one  
24 in three chance that an ID is going to be mistaken  
25 or that there's a two out of three chance that



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1 the suspect is going to be picked by the victim.

2 A. I don't know as though -- no, I did  
3 not, I did not include that, because that's a  
4 statement about cases in general, not a statement  
5 that's pertinent to this particular case,  
6 necessarily.

7 Q. So in this particular case then there  
8 is no single rate of misidentification that we  
9 can use to assess the reliability of the  
10 plaintiff's identification?

11 A. No, and there never -- there never  
12 would be in a specific case. I mean, regardless  
13 of what that general rate of misidentification is  
14 out there, like the one in three, for example --

15 Q. Right.

16 A. -- right, if you come across a witness  
17 who -- again, I'll just keep falling back on  
18 this example. I'm not saying that this example  
19 is relevant to this specific case, but where you  
20 have a witness who saw something, quote, saw  
21 something in complete darkness, right, that  
22 rate's irrelevant. What's going to happen is  
23 that among those who make a pick, if there are  
24 six people there, five out of six of them have  
25 to pick a filler.

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1 Q. Well, you would agree with --

2 A. Not one out of three.

3 Q. You would agree that things that are  
4 not relevant to this case do not play into the  
5 analysis then?

6 A. I think, generally speaking, if it's  
7 not that relevant to the case, then it's probably  
8 not part of the analysis, yeah.

9 Q. And so is there a single rate of  
10 misidentification in the controlled studies?

11 A. Well, we can average across the studies,  
12 but it's moving up and down as a function of the  
13 kinds of conditions that you gave me.

14 Q. So, I mean, has anybody averaged the  
15 various results?

16 A. There have -- there have been  
17 averagings of those results. They look a lot  
18 like what you see in the field if you average  
19 across all those variables.

20 Q. So do they also average across  
21 variable by variable?

22 A. Yes. Those would be, you know, what  
23 are referred to as meta-analyses.

24 Q. And so let's go back to averaging all  
25 of the variables. Is there an approximate rate

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1 that's been reached that's generally accepted in  
2 the community?

3 A. Well, I mean, there's a general  
4 acceptance at the level of saying, yeah, that's  
5 what the -- that's what the average of the  
6 studies is; right? I mean, an average is an  
7 average. I mean, anybody can go in and we do  
8 all of that and calculate an overall average.

9 What that average means is a whole  
10 other question, because you've created these  
11 conditions. I mean, so if -- if you throw in a  
12 whole bunch of studies that look at what happens  
13 when people witness something in darkness, right,  
14 it's going to start bringing down that average.  
15 That doesn't mean that most witnesses are  
16 witnessing things in dark.

17 So when you collapse over all  
18 those variables, you end up with something that  
19 could be misleading. It could be misleadingly  
20 low. It could be misleadingly high in the sense  
21 that there's all this variation from study to  
22 study depending on the situation or the conditions  
23 that you set up for the witnesses.

24 Q. So like we talked about before, it's  
25 not a one-to-one relationship. You can't take a

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1 study and put it next to a case file and take  
2 that study to estimate with precision the  
3 likelihood that the ID is or is not reliable?

4 A. That's correct, yeah.

5 Q. And in the eyewitness literature, is  
6 there a distinction between eyewitnesses who are  
7 victims of the crime versus eyewitnesses who may  
8 observe a crime, but they're not actually the  
9 victim?

10 A. There is, yes.

11 Q. And can you tell me about that?

12 A. Well, the bystander versus victim, you  
13 know, overall we don't see a lot of evidence for  
14 there being much difference. Bystanders are  
15 sometimes less likely to be stressed than  
16 victims, but victims sometimes get a better view  
17 than bystanders.

18 So, for instance, if you were to  
19 take -- let's say everybody sees the same event,  
20 but one of them is a victim and the others are  
21 bystanders. Chances are the bystanders are  
22 farther away. On the other hand, the victim  
23 might feel more stress or fear, so those might  
24 cancel out leading to no difference between  
25 victims and bystanders in that case.



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1 Other things being equal, you  
2 know, where they're both equally stressed or  
3 unstressed, they both have equally good or bad  
4 views, then there's no particular reason to  
5 think that bystanders and victims would be any  
6 different.

7 Q. The studies that you rely on in your  
8 report, are they primarily victim-based studies  
9 or are they bystander-based studies?

10 A. They would be primarily bystander-based.

11 Q. And why is that?

12 A. Because -- mainly because institutional  
13 review boards don't want us to do studies in which  
14 people become -- people think that they're -- that  
15 they're victims, so they tend to be bystander  
16 studies.

17 Q. And when you're accumulating the various  
18 reliability factors that can either knock an ID  
19 up or knock an ID down, how does this factor in?  
20 How do you adjust for whether the eyewitness is  
21 a bystander or the victim? What percentage does  
22 that --

23 A. You don't. You consider -- you consider  
24 that -- because bystander or victim is primarily  
25 a question of -- you know, the only reason there

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1 should be differences between bystander and  
2 victim have to do with viewing conditions, fear  
3 and stress. And so you go straight to the  
4 viewing conditions and fear and stress, whether  
5 the person is a victim or a bystander doesn't  
6 really much matter.

7 Q. Well, what about the fact that a  
8 bystander may not immediately notice that  
9 something is even going on? I mean, a victim is  
10 being victimized, so the victim knows that the  
11 crime is happening.

12 A. Right.

13 Q. A bystander is in the vicinity.

14 A. Right.

15 Q. So how is that not also a relevant  
16 difference between the two?

17 MR. SATIN: Objection. Vague.

18 A. It is, and we consider it to be part  
19 of the view. In other words, the view question  
20 is not just how good was their opportunity, but,  
21 in fact, what was -- what was their viewing  
22 behavior.

23 Q. So there could be differences in the  
24 incentive to view, so to speak?

25 A. There can be, and it can go the other

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1 way around too. So, for example, a victim might  
2 not want to look directly at the perpetrator;  
3 whereas a bystander may be quite willing to  
4 stand there and at a safer distance and look  
5 straight at that perpetrator.

6 Q. Right.

7 But you have no way of knowing  
8 that in any given case?

9 A. Well, that's what you try to -- no,  
10 but that's what you try to discern. You're  
11 trying to discern that. You're not trying to  
12 discern their victim or bystander status per se,  
13 but rather what -- you know, what are these  
14 other variables, because that's how you would  
15 find any difference between bystanders and  
16 victims is that they differ in those ways.

17 Q. Right.

18 But a victim could also want to  
19 look the perpetrator in the face as well?

20 A. Sure.

21 Q. And do the studies also distinguish  
22 between law enforcement involvement in the  
23 identification versus nonlaw enforcement  
24 involvement in the identification?

25 A. That's not -- that's not a distinction

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1 that has really been made within this  
2 literature, no.

3 Q. So it doesn't matter whether a police  
4 officer administers the procedure or some third  
5 party?

6 A. Other things being equal, it doesn't  
7 matter. I mean, the question is what was the  
8 protocol that was used on the procedure, not was  
9 this person a police officer or a civilian.

10 Q. But the protocol that you have been  
11 talking about today, that's all been studied  
12 largely and primarily in the context of law  
13 enforcement administration of IDs?

14 A. Well, in any -- it's been studied in  
15 the context of anyone administering an ID. I  
16 mean, when we do our experiments, it's not law  
17 enforcement per se that's doing -- that's doing  
18 these and not even -- except in some studies.  
19 There have been some studies that we've done  
20 like this where the witness presumes that it's  
21 law enforcement. But, no, there's no presumption  
22 here on the part of -- within the lab studies  
23 that it's -- that it's law enforcement that is  
24 administering that procedure.

25 Q. So then there is a distinction between

1 the two and there is research on both?

2 A. There's a distinction between the two  
3 in the sense that one's law enforcement, one's  
4 not. There's no presumption that it matters.

5 Q. So there is no general literature then  
6 that talks about that distinction and whether it  
7 has any impact or significance on the reliability  
8 of an ID?

9 MR. SATIN: Objection. Compound  
10 question.

11 A. Right.

12 MS. ROMEO: Do you want to break  
13 for lunch soon and then come back or how --

14 MR. WISE: It's kind of up to --

15 MS. ROMEO: Yeah, what do you guys  
16 think?

17 THE COURT REPORTER: I can go  
18 through or -- I mean, I'm fine.

19 MS. ROMEO: All right. So we'll  
20 just go for a little bit longer, and then we'll  
21 break for a short lunch break.

22 MR. SATIN: Is that okay with you?

23 THE WITNESS: Yeah. I feel like I  
24 just ate that breakfast.

25 MS. ROMEO: Oh, okay. Well, we

1 you're looking at things like the presence of  
2 distractions, the percentage of time devoted --  
3 you know, how much -- the percentage of time  
4 that's functionally then devoted to view even  
5 if -- so the opportunity to view may be X amount  
6 of time, but actual viewing is more likely to be  
7 some subset of that. Fear and stress being  
8 something that one would assess based on the  
9 nature of the circumstances. There are times in  
10 which that wouldn't be a factor or be present at  
11 all.

12 And then opportunity, which is  
13 still a part of acquisition, to have some kind  
14 of restful, calm reflection right after the  
15 event to think about what you just saw and  
16 consolidate that. So those are all factors that  
17 go into the acquisition of a memory.

18 Q. With respect to the research that's  
19 been done on these various acquisition factors,  
20 do all of the studies, whether of actual cases  
21 or controlled lab studies, I mean, do they all  
22 come out the same way?

23 A. Well, they all come out the same way  
24 in the sense that as you -- you know, when you  
25 create, for example, distractions, there's

1 can keep going.

2 THE WITNESS: But don't let me  
3 take things longer than you guys want to take  
4 them.

5 Q. All right. So let's talk generally  
6 about the factors that you consider to be  
7 important in assessing the reliability of an ID.  
8 Can you kind of give me a list?

9 A. Well, they fall in the three categories  
10 of acquisition, or what we sometimes call  
11 encoding; storage, or what we sometimes refer to  
12 as retention; and retrieval, or in the case of  
13 eyewitness identification, the identification  
14 procedures and matters surrounding it. So they  
15 fall -- they fall in those general three  
16 categories.

17 Q. So let's take each category in turn.  
18 Can you elaborate on when you're assessing an ID  
19 what are the sorts of things you're looking for  
20 with respect to acquisition?

21 A. Right. So there you're looking at  
22 things like view, attention, stress, fear; and  
23 view broadly to include relevant variables like  
24 lighting, distance, clarity.

25 And then for attention factors

1 something else also to pay attention to, that it  
2 reduces acquisition of the central or focal  
3 variable under consideration like a face. So,  
4 for example, we know that weapons distract.  
5 People pay attention to weapons. It's called  
6 the weapon focus effect. They'll observe the  
7 weapon. That's time away from the face.

8 So we know that the shorter the  
9 exposure, the longer the exposure, the less  
10 light, the less reliable. So they come out the  
11 same way in the sense that they always push  
12 things in the same direction.

13 Q. Right.

14 But do they come out the same in  
15 the sense of yielding consistent results across  
16 the general population?

17 A. Well, that is what we consider to be  
18 consistent results.

19 Q. So do they come out with consistent  
20 results, these studies?

21 A. Yes.

22 Q. And what are those consistent results?

23 A. Well, just the things that I have  
24 answered.

25 Q. Right.

1 But by "consistent results," I  
2 mean, do they yield a number? Like do they  
3 yield a percentage or do they just say this is a  
4 relevant factor and it may?

5 A. Well, any given study has a percentage.  
6 Doesn't mean you take that percentage and treat  
7 it like it's -- which as we talked about before,  
8 treat it like that's the same percentage it's  
9 going to be in any other situation.

10 Q. Right.

11 So these studies, as we discussed  
12 before, the purpose is to identify factors which  
13 may or may not affect the actual witness who is  
14 viewing the suspect at issue?

15 A. Well, these studies identify factors  
16 that do have that impact.

17 Q. With respect to the view, are there  
18 studies that discuss the viewing opportunities  
19 of a suspect in the sense that say you have  
20 somebody who is directly across from you, so  
21 they're looking face-to-face, as opposed to  
22 someone who gets mugged on the street and the  
23 perp runs away. Are there studies that discuss  
24 the likelihood of reliability with respect to  
25 those viewing conditions?

1 A. Well, I mean, there are studies that  
2 give better or worse views, and that's what  
3 you're describing.

4 Q. So if somebody is directly opposite  
5 you, that's a better view than if somebody --

6 A. Is behind you? Yes.

7 Q. What about to the side of you?

8 A. Well, if you turn and look at them,  
9 it's the same as being right in front of you, so  
10 you have to know what they're doing.

11 Q. Well, what if you only turn your head,  
12 but not your entire body?

13 A. Your body -- it turns out our eyes  
14 work just as well whether our body follows them  
15 or not.

16 Q. So there isn't a study that discusses  
17 the particular difference about the viewing  
18 opportunities that we just talked about? And if  
19 there is, if you could point me to it.

20 A. As to whether you turn your head to  
21 the side to see something or --

22 Q. No, just general viewing conditions,  
23 so that discusses the witness' ability to view  
24 the person, which could be in a number of  
25 different situations. It could be directly

1 across. Could be just turning your head. It  
2 could be, you know, you don't even see the  
3 person; the person is behind you. You know, has  
4 there been a study done that talks about that?

5 MR. SATIN: Objection. Vague as  
6 to "that."

7 A. Well, there are -- there are studies  
8 that manipulate viewing conditions in various  
9 ways. I mean, for example, how long the person  
10 was in view, their distance from you. And it  
11 seems to me that what you're describing with,  
12 you know, your sort of hypothetical, no one  
13 would describe a study in which they would say,  
14 okay, the person was directly in front of them  
15 versus the person was behind. I mean, what you  
16 would want to know is how long was the exposure  
17 time.

18 Q. So what are the studies on exposure  
19 time?

20 A. There are studies that -- there are  
21 many studies that manipulate exposure time.  
22 They'll manipulate it not as a focal variable,  
23 because it's just so obvious, but rather as what  
24 we call a background variable, so let me explain  
25 what I mean by that, or what's called a

1 moderator variable.

2 So, for instance, you know,  
3 suppose that your primary interest in the study  
4 is in whether people have more trouble, more  
5 difficulty identifying someone of your own race  
6 than another race; right? Well, what they might  
7 do is give -- is manipulate also not just the  
8 race of the person that you're looking at, but  
9 also how long the exposure time was.

10 And they're not really interested  
11 in exposure time, because they know what that's  
12 going to do. They're interested in the question  
13 of, for example, if exposure time is long enough,  
14 can you overcome the cross-race effect.

15 Q. So then since it is obvious, it would  
16 be the case that being directly across from the  
17 perpetrator would increase the chances that an  
18 ID is reliable?

19 A. It's functional exposure time, not  
20 opportunity that matters. So someone could be  
21 directly across from you; but if -- you know, if  
22 your attention is directed down here, right,  
23 them being directly across from you doesn't  
24 really matter. So it's functional exposure  
25 time, not just opportunity to view.

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1 Q. Right.  
 2 But let's isolate that factor.  
 3 A. Uh-huh.  
 4 Q. So let's isolate the viewing  
 5 opportunity --  
 6 A. Correct.  
 7 Q. -- away from --  
 8 A. Right.  
 9 Q. -- attention --  
 10 A. Right.  
 11 Q. -- or from weapon focus or from  
 12 whatever.  
 13 A. Right.  
 14 Q. If you have a direct view, because  
 15 you're directly across from the person who is  
 16 victimizing you, that is an indication of  
 17 reliability; would you not agree?  
 18 A. Well, it's a -- it would be a -- it  
 19 would go into -- it would -- it would allow for  
 20 reliability depending on other things that you  
 21 would observe.  
 22 Q. Right.  
 23 A. I mean, you still would -- you would  
 24 consider the totality of circumstances. For  
 25 example, if one is claiming that they had a

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1 great view, right, you would want to see a great  
 2 description.  
 3 Q. Right.  
 4 But my question is, let's isolate  
 5 the one factor, the viewing opportunities, from  
 6 everything else and just answer whether that is  
 7 an indicator of reliability. Whether it's  
 8 affected down the line by other factors is a  
 9 separate question.  
 10 A. If you isolated that one --  
 11 Q. Yes.  
 12 A. -- variable, then that would -- you  
 13 know, and you're hypothetically comparing it to  
 14 them not being in front of you?  
 15 Q. Correct.  
 16 A. Then yes.  
 17 Q. And even if the person is not directly  
 18 in front of you where you have at least this  
 19 opportunity to have an optimal viewing condition --  
 20 A. Being directly in front of you doesn't  
 21 necessarily make it an opportunity for an  
 22 optimal viewing condition.  
 23 Q. Correct.  
 24 But let's just say --  
 25 A. Okay, right.

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1 Q. -- for the purposes of this hypo a  
 2 person is directly in front of you.  
 3 A. Uh-huh.  
 4 Q. And perhaps there are some other  
 5 things that affect the viewing conditions, so  
 6 let's just say it's nighttime, but there are,  
 7 you know, lights, traffic lights and the sort.  
 8 A. Uh-huh.  
 9 Q. The presence of not having the direct --  
 10 one person directly in front of the other, it  
 11 doesn't make an ID impossible?  
 12 A. No.  
 13 Q. And if the lighting conditions, you  
 14 know, it's not broad daylight and it is  
 15 nighttime and there's streetlights, that doesn't  
 16 make an identification impossible?  
 17 A. No.  
 18 Q. And if there's some distance between  
 19 the perpetrator and the victim, that wouldn't  
 20 make an ID impossible; is that correct?  
 21 A. Depending on that distance, yes.  
 22 Q. But let's say it's a modest distance.  
 23 Let's say 25 feet.  
 24 A. Right.  
 25 Q. It's not impossible; correct?

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1 A. Right, right.  
 2 Q. What about 50 feet, is that impossible?  
 3 A. No.  
 4 Q. What about a hundred feet, is that  
 5 impossible?  
 6 A. It's not impossible, but it's starting  
 7 to push some limits.  
 8 Q. Where would you put the limit on  
 9 distance?  
 10 A. It generally is being -- it's  
 11 generally being put at around 140, 150 feet.  
 12 Q. Is there a leading study on that?  
 13 A. Geoffrey Loftus' work.  
 14 Q. Loftus? Okay.  
 15 A. When you look up -- if you look up  
 16 Loftus, you're going to see most of the work  
 17 that you'll go to will be Elizabeth Loftus.  
 18 It's not Elizabeth Loftus. This is Geoff with a  
 19 G.  
 20 Q. Okay. So once you start to hit the  
 21 line where things might get a bit blurry in  
 22 terms of distance --  
 23 A. Uh-huh.  
 24 Q. -- how do you adjust for that distance  
 25 factor when you're assessing the reliability of



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1 the ID? How do you do it? What's the value?  
 2 A. When you get out to that point?  
 3 Q. Yeah.  
 4 A. You know, if you were out around the  
 5 fringes like that, you would -- you would refer  
 6 to Geoff Loftus' tables and formulas.  
 7 Q. So he actually has numbers where you  
 8 could say, you know, this ID should be knocked  
 9 down, the reliability is knocked down, 10  
 10 percent or 15 percent?  
 11 A. Right.  
 12 Q. But Geoff Loftus, he makes the  
 13 distinction at like 140, 150 feet; correct?  
 14 A. Yeah. And it's a -- it's a continuous  
 15 process once you get beyond, you know, 40 feet  
 16 or so. So there's not all of a sudden some  
 17 dramatic drop-off at that point where you draw a  
 18 line at some point in time.  
 19 Q. Do his tables give you figures across  
 20 the board like the whole continuum from 0 feet  
 21 to 150 or do they start at a certain point?  
 22 A. Not at every interval, but, you know,  
 23 we know a lot about the visual system, and we  
 24 know that it's basically a linear process, so  
 25 you sample along those numbers.

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1 Q. So what are the intervals?  
 2 A. I don't remember what ones he used.  
 3 He's done more than one study and probably used  
 4 different testing intervals in there.  
 5 Q. Do you think that he's put an interval  
 6 on a hundred feet, for example? Like do you  
 7 think the intervals start lower or higher is my  
 8 question.  
 9 A. Well, they start much lower than that.  
 10 Q. How low would you estimate that they  
 11 start?  
 12 A. Oh, they start at like 5 feet. As I  
 13 recall, that's about where he starts them.  
 14 Q. Okay.  
 15 A. And then you don't see much difference  
 16 between 5 and 15. I mean, the human eye makes  
 17 certain adjustments and -- but it just has  
 18 limits.  
 19 Q. So you said it's a continuum and it's  
 20 not like there's a, you know, dramatic -- where  
 21 do you start to see the differences? Is it at 5  
 22 to 15 or is it a further distance?  
 23 A. You don't see much happening in 5 --  
 24 in 5 to 15. There's a little bit going on in  
 25 there, but not much.

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1 Q. So where does it start?  
 2 A. Well, I mean, most people start it at  
 3 around 20 and say, yeah, look at what's starting  
 4 to happen at that point.  
 5 Q. Right.  
 6 And then when does the -- is there  
 7 a dramatic drop-off at any point?  
 8 A. No. It's a continuum.  
 9 Q. And it's fairly consistent along the  
 10 way?  
 11 A. It's fairly predictable from the  
 12 previous data point, yeah.  
 13 Q. So the time that you could view a  
 14 perpetrator can obviously vary.  
 15 A. Right.  
 16 Q. It could be seconds. It could be  
 17 minutes.  
 18 A. Right.  
 19 Q. Even if it's relatively brief, does  
 20 that make an ID impossible?  
 21 A. No.  
 22 Q. And even if it was really long, does  
 23 it make an ID absolutely possible?  
 24 A. Makes it possible. You mean -- you  
 25 mean -- is that what you meant to ask?

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1 Q. Yeah. What I mean -- no, what I mean  
 2 is, if a person had a really long time to view  
 3 the perpetrator, does that guarantee that  
 4 they're going to be able to ID the person?  
 5 A. No.  
 6 Q. If the person is stressed, does that  
 7 make giving an ID impossible?  
 8 A. No.  
 9 Q. If the person is experiencing fear,  
 10 does that make it impossible for a person to  
 11 make an accurate identification?  
 12 A. No.  
 13 Q. And if the person didn't have -- I  
 14 think you identified that there's a period where  
 15 they can reflect on the event. If they didn't  
 16 have that, does that make the ID impossible?  
 17 A. No.  
 18 Q. And going to weapon focus for a  
 19 minute, can you tell me about the literature on  
 20 that?  
 21 A. Well, weapon focus has primarily tried  
 22 to -- as the name implies, has primarily tried  
 23 to look at the fact that or look at the question  
 24 of if there's a weapon present, if there's a  
 25 weapon visible to the witness, does it draw

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1 attention. Is some percentage of the witness'  
2 attention then drawn to that, which means  
3 anytime it's drawn to that, it can't be focused  
4 on the face. And that literature is pretty  
5 consistent in showing that, yes, the presence of  
6 a weapon does that.

7 These studies have tried to do  
8 this kind of thing in a variety of ways. I  
9 mean, some of the very earliest just simply  
10 asked, you know, does it, does the presence or  
11 absence of a weapon, impair memory for the --  
12 for the perpetrator in the scene. But then  
13 others begin to look at things like eye  
14 movements, so measuring people's tendencies to  
15 glance away and focus on the weapon, which they  
16 do. And then other work has come along and  
17 pointed out that actually attention gets  
18 misdirected or gets directed to any unusual  
19 object.

20 Q. Is there a distinction --

21 A. So if you pull out a carrot, for  
22 example, the same thing. Same kind of thing  
23 happens, but --

24 Q. So is there a distinction between a  
25 weapon that is placed, you know, directly to a

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1 victim's head, for example, versus a situation  
2 where, you know, as is the case here, the  
3 plaintiff was shot at in her car, while she was  
4 in her car, from another car? So a weapon is  
5 pointed, quite clearly, but it's not in the  
6 face.

7 A. There hasn't been a distinction like  
8 that made in the literature.

9 Q. Is that because the studies have  
10 yielded results that don't show a distinction or  
11 is it because the studies focus on weapons in  
12 the close proximity of the victim?

13 A. Well, they're not dealing with weapons  
14 in the close proximity of the victim. They're  
15 dealing with weapons that are in the hands of  
16 the perpetrator. They're not -- it's not --  
17 it's not up close to them.

18 Q. Right.

19 But wouldn't viewing -- let's say  
20 it's a gun; right? So let's say the gun is  
21 right in front of your face. I mean, that's  
22 different than if the gun is where that coat  
23 rack is over there.

24 A. It probably would be different.

25 Q. So what I'm trying to get at is

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1 whether the literature has tested that  
2 difference and whether there's been a finding  
3 that that difference doesn't have significance  
4 or whether the literature has focused more on  
5 the situation where the weapon is actually in  
6 the very, very near vicinity of the victim.

7 A. None of the studies have been done  
8 where it's very near the vicinity. It would  
9 always be of the type where somebody is standing  
10 at a distance with a weapon.

11 Q. So do you think that there's a  
12 distinction between based on your professional  
13 experience?

14 A. Yeah, but there would be a lot of  
15 differences. For example, it may be impossible  
16 at that short distance to actually even see the  
17 person, so it could even obstruct view. It may  
18 be that fear is even greater if it's right at  
19 your head, but on the other hand, if it's being  
20 fired at you.

21 You know, so that's the whole  
22 other element of the weapon effect, and that is  
23 that there's sort of these two components. It's  
24 called weapon focus effect because that's what --  
25 because what the work has shown is that people

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1 focus on the weapon, but the presence of a  
2 weapon also escalates fear and stress quite  
3 independently of what it does to attention.

4 Q. Right.

5 But, I mean, that's not capable of  
6 mathematical precision. I mean, everybody  
7 experiences stress and fear differently; correct?

8 A. Yes.

9 Q. So, I mean, one person -- and let's --

10 A. But the effect of stress and fear is  
11 the same.

12 Q. Well, let's take an example. Let's  
13 take an example of a person that lives in a  
14 conflict zone where people walk around with  
15 machine guns every day versus a person in New  
16 York City who may have never even seen a handgun  
17 in their entire life. Do you think that the  
18 reaction to seeing a weapon is going to be  
19 exactly the same?

20 A. Probably not under that hypothetical,  
21 but I think that if a weapon is being fired at  
22 you, I think that the reaction is pretty much  
23 the same whether you're in New York or in a  
24 conflict zone.

25 Q. Right.

1 But in terms of -- but talking  
2 about the weapon focus, the idea that your  
3 attention is going to go to the weapon, I'm  
4 trying to see whether there's a distinction  
5 between, you know, persons who may or may not be  
6 more accustomed --

7 A. For whom it's more novel?

8 Q. Right, exactly.

9 A. And so -- and so, you know, you always  
10 try to assess that possibility by looking at,  
11 for example, things that the witness might have  
12 said. If the witness said, "I saw the weapon,"  
13 that's -- then obviously in order to see the  
14 weapon, they had to have been looking at the  
15 weapon.

16 If you've got a witness, even if  
17 there was a weapon present, who says, you know,  
18 "I didn't -- I think he had a weapon, but I  
19 didn't see one," well, then whether they had a  
20 weapon or not doesn't matter. So the question  
21 is relevant in terms of what they were focused  
22 on. And in that sense it doesn't matter. You  
23 know, there's nothing special about weapon focus  
24 in that situation.

25 It may also be the case that, for

1 example, if someone right next to you was shot  
2 and that's your focus, it's the same thing. It's  
3 a distraction, something else that's cutting  
4 down dramatically on functional exposure time to  
5 the face of the perpetrator.

6 Q. That's all relevant to the analysis of  
7 whether weapon focus is at play, correct, all of  
8 these things you just talked about?

9 A. Sure.

10 Q. So do you know whether the plaintiff  
11 in this case has ever seen a gun before?

12 A. Well, she claims she saw this gun.

13 Q. Right.

14 But before this are you aware?

15 A. No.

16 Q. And even if a gun is present, does  
17 that make it impossible for a person to render  
18 an accurate identification?

19 A. No. I'll always answer that question  
20 with no. And you're asking me whether something  
21 is impossible, and scientists don't say  
22 anything's impossible.

23 Q. So it's not impossible if somebody was  
24 pointing a gun at me and the gun was where the  
25 coat rack is; correct?

1 A. It's not impossible.

2 Q. And it's not impossible if the gun was  
3 right here next to my head either for me to make  
4 an identification?

5 A. I mean, it's not impossible.

6 Q. Is there a difference, in your opinion,  
7 between getting shot at directly at your person,  
8 like your body, as opposed to being shot at while  
9 you're in a car where you can duck, for instance,  
10 or, you know, do something like that?

11 MR. SATIN: Objection. Vague.

12 A. Well, there's no reason to think there  
13 would be a difference unless it brought into  
14 play other things. Like, for example, by having  
15 some kind of barrier like a seat inside of a car  
16 to get away from, let's say, a shot being fired  
17 means that you've lost all opportunity to  
18 observe the shooter; whereas if you were out in  
19 the open, you might still be -- you know, in an  
20 attempt to protect yourself, you might still be  
21 looking at least in the direction of the shooter  
22 as you're trying to engage in this survival kind  
23 of thing, although in most cases your concern is  
24 with the weapon, not the face of the shooter.

25 Q. Even in a case where you're shot at in

1 a car, though, you could still make an accurate  
2 identification; correct? It's not impossible.

3 A. It's not impossible.

4 Q. And even if you were in a car, you  
5 could still do the same exact thing that you  
6 just mentioned for somebody out in the open to  
7 kind of look up, you know, look down; look up,  
8 look down; look up, look down, so to speak?

9 A. You could.

10 Q. Do you know whether that's the case  
11 here?

12 A. Whether what's the case?

13 Q. That Varda Guetta was in a car when  
14 the shooting attack occurred. Are you aware of  
15 what she did while she was in the car and being  
16 shot at?

17 MR. SATIN: Objection. Compound  
18 question, and counsel is editorializing the  
19 evidence.

20 Q. You can answer.

21 A. Well, my recollection is that she  
22 reported trying to tend to her son, and I don't  
23 recall specifically what she might have said  
24 about trying to duck down to protect herself.  
25 Most of -- as I recall, what she had to say was

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1 that her primary concern was her son, who would  
2 have been obviously occupying a lot of her  
3 attention during this episode.

4 Q. So is it your position that if there's  
5 a family member present at the scene of a crime  
6 while a crime is occurring, that that person  
7 can't make an identification?

8 A. I don't think I said anything like  
9 that.

10 Q. So then it's not impossible for  
11 someone who is tending to a family member that  
12 may also be present during the crime to make an  
13 accurate identification?

14 A. Nothing's impossible.

15 Q. And even if a crime takes place at  
16 night with some light, it's not impossible to  
17 make an identification?

18 A. It's not impossible.

19 Q. So let's talk now about -- I think the  
20 next set of variables that you identified are  
21 the retention variables. Do you want to expand  
22 on what factors are encompassed under that  
23 category that are relevant to your analysis?

24 A. Well, the primary factor involved  
25 here, and typically involved in retention, is

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1 period of time.

2 And so the other thing about the  
3 retention period is that there are what we call  
4 postevent information that can occur where, for  
5 example, someone can suggest something to a person  
6 about their memory about the original event and  
7 they will incorporate it in even though it's not  
8 something that they directly observed or they  
9 directly experienced, and it can become a part of  
10 what they ultimately report. So the retention  
11 interval is a critical interval because its length  
12 matters, but also things that occur during that  
13 period.

14 We know that, for example, people  
15 will -- even without external suggestion, they'll  
16 go back and because if it's a significant event  
17 and they have gaps in their memory, they will  
18 fill those -- the tendency is to fill in those  
19 gaps with inferences and guesses and suppositions  
20 and deductions so as to achieve a kind of sense  
21 of closure on it, a sense of having a more  
22 complete memory, so those are things that happen  
23 during that retention interval too.

24 Q. So you mentioned that the mathematical  
25 curve with respect to retention will flatten

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1 the frailty of memory across time. So, you know,  
2 the oldest findings in scientific psychology  
3 concern the question of how -- you know, the  
4 fate of memory across time, the so-called what  
5 most people talk about as forgetting.

6 And so what happens here, of course,  
7 is that we know the -- we know the direction of  
8 this variable quite well. We know that memory  
9 doesn't get better with time, and so the longer  
10 the time passes, the longer the passage of time  
11 between acquisition and retrieval, the less  
12 reliable the memory.

13 Now, the actual function,  
14 mathematical function, that relates the passage  
15 of time to memory, we know the shape of that.  
16 It's a so-called negatively decelerating curve.  
17 So what that means is that forgetting is more  
18 rapid in the early times after an event than it  
19 is later, so it starts to level off. It becomes  
20 proportional to what's left.

21 So, for instance, you'll lose more  
22 information in memory during the first month after  
23 an event than between the first month and the  
24 second month, because this negatively decelerating  
25 curve is ultimately flattening out over a long

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1 out, so the month immediately after, you know,  
2 you may forget certain things and then it starts  
3 to kind of bottom out. So is it correct to say  
4 that once you hit that baseline of what you're  
5 going to remember, then that's still what you're  
6 going to remember a year from now or two years  
7 from now?

8 A. Well, it never stops dropping until it  
9 gets down to zero, but the rate of drop is lower.  
10 So, for example, what you forget -- what's  
11 forgotten in the first year, from zero time  
12 after the event until one year, is much greater  
13 than what's forgotten between Years 7 and 8;  
14 right? But -- and so what that means is that  
15 there's probably not a lot of difference between  
16 four years and nine years, quite frankly, because  
17 it's already so low by that point that it's not --  
18 it's not rapidly accelerating down.

19 Q. Right.

20 But it's not impossible to make an  
21 identification at four years; correct?

22 A. It's not impossible.

23 Q. It's not impossible to make an  
24 identification at nine years either; correct?

25 A. Not impossible. Just highly improbable.



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1 Q. What's "highly improbable" mean?

2 A. It means that the -- unless -- it  
3 means that it could be done under the right  
4 circumstances. So, for instance, if you had  
5 hours and hours of interaction with somebody, a  
6 lot of exposure to them, then it may be that  
7 nine years later you could do that; but if  
8 you're already starting off with a relatively  
9 weak memory, you're -- it's going to be very  
10 improbable that with that kind of passage of  
11 time you can make a reliable identification, but  
12 not impossible.

13 Q. Have you seen circumstances in which  
14 there is something that you view as a highly  
15 improbable ID has turned out to actually be, in  
16 fact, accurate?

17 A. I can't think of -- I can't think of  
18 such a situation, such a case.

19 Q. Have you ever seen what you would call  
20 a reliable ID turning out to be inaccurate?

21 A. I've seen -- I have seen cases that if  
22 I had not known otherwise, I would have probably  
23 assumed were reliable.

24 Q. Can you give me an example?

25 A. Yeah. I think that the case of

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1 Jennifer Thompson and what turned out to be her  
2 misidentification of a guy named Ronald Cotton  
3 proven to be incorrect through DNA testing. She  
4 gave amazing testimony at trial about how she  
5 studied her attacker's face very carefully. She  
6 spent a lot of time with him. How she was  
7 absolutely determined that she would never  
8 forget his face, that she was going to make him  
9 pay for this.

10 And she gave a rather detailed  
11 description and even did a composite -- and had  
12 what she believed to be such a good memory that  
13 she actually did a composite drawing of him.  
14 And she identified him first from photos and  
15 then from a live lineup and then at trial said  
16 she would never forget that face, she was  
17 absolutely positive, there was absolutely no  
18 doubt in her mind.

19 He was convicted. Eleven and a  
20 half years later DNA proved he didn't do it and  
21 pointed to the real perpetrator, Bobby Poole.  
22 At that time, prior to the DNA testing, I would  
23 have said, you know, a lot of these IDs are  
24 questionable, but I wouldn't have called that  
25 one questionable.

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1 Q. So other than that ID, have you ever  
2 opined that an ID was reliable?

3 A. I've opined that ID procedures that  
4 were used were good, reliable procedures, but  
5 not that the ID itself was necessarily reliable.

6 Q. So in all of your cases for which  
7 you've been retained as an expert then, you have  
8 opined that the actual ID is unreliable based on  
9 the totality of the circumstances?

10 A. Yes.

11 Q. And in all of those cases did you go  
12 through and assess all three levels, acquisition,  
13 retention and retrieval?

14 A. Yes.

15 Q. Even if acquisition and retention,  
16 according to you, there's a nearly zero chance  
17 that the ID is reliable?

18 A. Then would I look at retrieval?

19 Q. Right.

20 Yeah, my question is, in situations  
21 where you have found that the acquisition and  
22 retention variables are so low, have you then  
23 gone on in every case to look at the retrieval  
24 factors?

25 A. Yes.

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1 Q. Can you give me an example of some of  
2 the other unreliable IDs that you've opined on?

3 A. Sure. There was the case of Chicago  
4 versus Newsome where the -- it was a murder  
5 case, and the -- but I -- but I came in after,  
6 postexoneration.

7 Q. So all of these examples would include  
8 cases where you knew that the ID was actually  
9 inaccurate?

10 A. Right.

11 Q. So you can just finish giving me that  
12 example.

13 A. Well, in the Newsome case, there were  
14 three eyewitnesses to a murder. All three  
15 testified at trial that they identified Newsome  
16 from a live lineup. Ultimately it was proven  
17 after, I think, seventeen years in prison that  
18 Newsome didn't do it, and it was also proven who  
19 did.

20 And the sole surviving witness --  
21 two of them were dead by that point -- came  
22 forward and said, "Here's what really happened.  
23 The police, Chicago Police Department, when I  
24 was viewing the live lineup, I said, 'I don't  
25 see the guy there. The guy that -- the guy that

1 committed this murder is not there.' And they  
2 said, 'Yes, he is,' and they forced me to pick  
3 Number 2." Well, of course, this just became,  
4 you know, that's what he says. The Chicago  
5 Police Department says, "No, we didn't do that,"  
6 right, the detectives.

7 So in that case I did an analysis  
8 of the lineup. We know who the real perpetrator  
9 was. In fact, we had a picture of the real  
10 perpetrator from within a week of the actual  
11 murder.

12 And what I showed was that if  
13 you -- using various experimental methods, that  
14 in that lineup Newsome would have been the last  
15 person anyone would have picked if they'd have  
16 seen the real murderer. The chances of three  
17 out of three of these witnesses independently  
18 picking Newsome was astronomically low, which  
19 the Court accepted. The jury accepted. They  
20 rendered a verdict for the plaintiffs. Chicago  
21 bitched. It went to the Seventh Circuit.  
22 Seventh Circuit, very conservative circuit,  
23 upheld the ruling and said that my analysis was  
24 correct.

25 Q. So as you noted, all those cases were

1 exoneration cases of some type. So would this  
2 be the first case that you're opining on whether  
3 the ID is reliable or not and we don't know  
4 whether the identified person, in fact, committed  
5 the crime?

6 A. In the civil domain?

7 Q. Correct.

8 A. That might be true, with -- again,  
9 with the exception that when you say we know for  
10 sure that the person didn't commit the crime,  
11 I'm going to give you another kind of example  
12 where, for example, the DNA in a rape victim  
13 does not match ultimately -- once forensic DNA  
14 testing came along, does not match the person  
15 who was convicted.

16 And on the basis of that, the  
17 conviction is overturned, but the county or the  
18 city takes the view that, oh, we don't know  
19 whose DNA that is and maybe the rapist did not  
20 ejaculate, and just showing that it's not him,  
21 and so they fight it on the grounds that they  
22 think that --

23 Q. So let's --

24 A. And so it works out exactly the same  
25 where what you're doing is you're still trying

1 to say yes, but -- so let's assess the ID,  
2 because they're saying we got the ID. We'll  
3 assess the ID with regard to its reliability, in  
4 which case there's not a concession at all that  
5 he was definitely innocent, and so it becomes  
6 that same kind of situation.

7 Q. Well, this would be the first time,  
8 though, that you're opining on a case where the  
9 ID is shown -- let's just say that there's a  
10 very high probability that the ID is inaccurate,  
11 so this would be the first time that you're  
12 opining on the reliability of an ID in the  
13 context of a case where we do not know that  
14 there's a high probability that it's inaccurate?

15 MR. SATIN: Objection. Vague.

16 A. That would probably be true among the  
17 civil cases, yes.

18 Q. So going back to the passage of time,  
19 would you say that -- you stated earlier your  
20 position that because people are people, we all  
21 experience trauma from a crime in exactly the  
22 same manner and that it will manifest in exactly  
23 the same manner.

24 MR. SATIN: Objection. Compound  
25 question.

1 Q. Is that correct?

2 A. I don't think I ever said that.

3 Q. So then victims of --

4 A. By the way, the word "trauma," I'm not  
5 talking about trauma at all here.

6 Q. Okay. Well, what does "trauma" mean  
7 to you in the context of eyewitness IDs?

8 A. Well, trauma would typically be some  
9 kind of indication that there -- it would be  
10 indicated if there's some kind of strong  
11 dysfunction on the part of the, for example,  
12 victim where let's say they can't even remember  
13 the event or -- you know, so that would be an  
14 example of trauma. What I talk about is stress  
15 and fear.

16 Q. How is that different from trauma?

17 A. Well, I mean, you can be stressed and  
18 you can be fearful and still be aware and be  
19 functioning. If one is traumatized at the time,  
20 which is what's relevant here, it's not a  
21 question of whether she's felt some kind of  
22 posttraumatic stress afterward. That's not  
23 really relevant to my analysis.

24 Q. So victims don't experience trauma  
25 while they're being victimized?

1 A. Well, they can. I don't -- I don't  
2 see any level of total dysfunctional trauma that  
3 might have occurred here. I mean, she was still  
4 attending to her son, for example. But if it --  
5 but if it were trauma, then, which is not  
6 something that I've been opining about at all;  
7 but if it were trauma, then that goes way beyond  
8 stress and fear to be basically a form of  
9 cognitive processing, a disruption that would be  
10 even less favorable for anything having to do  
11 with witnessing.

12 Q. Well, what I am trying to get an  
13 answer to is in a situation where a victim is  
14 subject to a crime, and you've stated that we  
15 all process fear and stress in the same manner,  
16 is that the same principle that you would apply  
17 to the passage of time? So, for example, our  
18 memories are all similar. They all retain at  
19 the same rates.

20 MR. SATIN: Objection. Misstates  
21 the testimony, vague and compound question.

22 A. The negative accelerating curve of  
23 forgetting applies -- we've never seen an  
24 exception to that in anybody who's ever been  
25 tested. You've got two ways you can do that,

1 what we call between-subjects designs and within-  
2 subjects designs. So between-subjects designs  
3 you're collapsing across a lot of people and  
4 looking at this curve. But you can also look at  
5 it within a given person and you see the same  
6 kinds of things; and, you know, it's always --  
7 it's always following that curve, so --

8 Q. Right.

9 But can the curve start at a  
10 different point for one person?

11 A. Absolutely. Of course it can start at  
12 a different point.

13 Q. Right.

14 And the point that it could start  
15 at could be higher for one person as opposed to  
16 lower for another person?

17 A. Sure. And most of that's going to  
18 depend not so much on the person as the  
19 circumstances.

20 Q. So postevent information, if there is  
21 the presence of postevent information prior to a  
22 witness making an identification, does that make  
23 the identification impossible?

24 A. Impossible, no.

25 Q. How important do you think that that

1 factors into the analysis, that particular  
2 factor?

3 A. Into my analysis?

4 Q. Yes.

5 A. Well, there's -- the records are so  
6 poor that it's unclear, but the timespan is so  
7 long that it's unclear what postevent information  
8 might have occurred in that period of time.

9 Q. I mean, by definition a long period of  
10 time would mean that there's more opportunity  
11 for postevent information to occur; correct?

12 A. Yes.

13 Q. So then how can an identification be  
14 possible at nine years?

15 A. Because everything's possible.  
16 Identification would be improbable at nine years,  
17 but not impossible.

18 Q. Where would you categorize the witness'  
19 description of a subject? What stage does that  
20 fall under?

21 A. Well, it's an indication of when it --  
22 to the extent that the description is occurring  
23 relatively soon after the event, it's an  
24 indication of the extent of acquisition. It's  
25 an indication of that.

1 The description itself is not  
2 acquisition, storage or retrieval. The  
3 description itself is -- well, I mean, it is a  
4 type of retrieval that's occurring at that  
5 point; right? When you ask someone what did  
6 he look like, they're engaged in a form of  
7 retrieval at that point. The significance of  
8 it, among other things, is that how extensive  
9 detailed that description is is an indicator of  
10 how good the acquisition was.

11 Q. Is there research to support that?

12 A. Well, there's research showing that  
13 the longer you give someone to view a face, the  
14 more descriptors they'll generate of that face.  
15 The better the view you give them, the more  
16 descriptors they'll show, they'll come up with.

17 Q. But are there studies that show that  
18 the amount of detail that a suspect gives in a  
19 description correlates to identification  
20 reliability or identification accuracy?

21 A. Yeah. The correlation is a modest  
22 one, and it depends on how you calculate it. So  
23 for instance, in one study that Jack Brigham at  
24 Florida State and his colleagues did, they had  
25 everybody view exactly the same event, exactly

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1 the same face and everybody's tested with that  
2 face. And what they found was that how well you  
3 could describe that face did not do a good job  
4 of predicting how well you could identify that  
5 face.

6 But what we did was we showed that  
7 if you test across people multiple faces, you  
8 let other things vary, like they do in real  
9 cases, that there is a correlation between how  
10 good the description is and how good their  
11 identification is. And the reason for that is  
12 because when conditions foster an easy  
13 identification -- an easy description are the  
14 same factors that foster an easy identification.

15 Q. So at the very least, though, there  
16 isn't a study that you could point me to that  
17 says that the general description will increase  
18 the likelihood that the identification will be  
19 unreliable?

20 A. I can point to a study that shows that  
21 faces -- that faces that are more easily  
22 described are also faces that are more easily  
23 identified.

24 Q. And what study is that?

25 A. That's one of my articles from -- it's

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1 going back a ways. I was thinking it was '85.  
2 Why does that ring a bell? Okay. Let me look  
3 in '85.

4 Q. Okay.

5 A. Yeah. Published in the Journal of  
6 Applied Psychology in 1985, verbal descriptions  
7 of faces from memory: are they diagnostic of  
8 identification accuracy.

9 Q. And you would agree that just because  
10 a witness isn't asked to give a description at  
11 the time of the crime, that it's still possible  
12 for them to remember what the face looked like?

13 A. It is not impossible.

14 Q. What's your position on that? If a  
15 witness is not asked right after the attack for  
16 a description of the suspect, what is your  
17 position on how that affects the reliability of  
18 an ID?

19 A. If they're not asked for a description  
20 right afterward?

21 Q. Right. And we'll take a break after  
22 this question, so --

23 A. Well, I don't -- I don't think we  
24 have -- so your question, so it would be like  
25 asking versus not asking for a description right

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1 afterward, does that have an impact on a later  
2 ID?

3 Q. Yes.

4 A. I don't know that we know anything  
5 about that.

6 MS. ROMEO: Okay. So why don't we  
7 take a break here.

8 (A recess was taken.)

9 Q. So when were you retained by  
10 defendants' counsel in this case?

11 A. You know, I don't remember exactly.  
12 I'm thinking that it was in probably early  
13 spring.

14 Q. Of 2013?

15 A. I think so, but sometimes I say in the  
16 report, and I don't know if it's -- I don't say,  
17 but that's my best recollection is it was  
18 sometime around that.

19 Q. And have you worked with Miller &  
20 Chevalier before?

21 A. No.

22 Q. And what were you retained to do?

23 A. Evaluate the eyewitness identification  
24 evidence related to this case.

25 Q. And did you speak to anyone in the

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1 process of preparing this report?

2 A. Just maybe a phone call or two asking  
3 if there were any more materials that were  
4 related to the case. I thought it was relatively  
5 sparse in the way of documentation, especially  
6 of the ID procedure.

7 Q. So when you asked for more documents,  
8 did you ask for specific documents?

9 A. No. I asked, you know, what was there,  
10 was there anything more, for example, about who  
11 the other individuals were in these photos.

12 Q. In which photos?

13 A. The photos from which the witness made  
14 an identification.

15 Q. The identification that's at issue in  
16 this case; correct?

17 A. Uh-huh.

18 Q. And there are about 15 photos?

19 A. That sounds right.

20 Q. Did you ask for anything else?

21 A. No. I think more of a general sort of  
22 updating request for, you know, anything else  
23 that they -- that they might have in a case.

24 Q. And if they had given you more  
25 materials, then you would have included that in



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1 your analysis?  
 2 A. If it was relevant, yes.  
 3 Q. How do you determine what's relevant?  
 4 A. If it bears on the reliability issue  
 5 that I was asked to address.  
 6 Q. And just to be specific, you would  
 7 include it if it makes it more reliable; correct?  
 8 A. Sure, yeah.  
 9 Q. Or less reliable?  
 10 A. Right.  
 11 Q. And what if it's just a wash?  
 12 A. Then it has -- then it has no bearing.  
 13 Probably wouldn't end up in the report at all,  
 14 except maybe listed as something that I was  
 15 given.  
 16 Q. So what materials did you rely on in  
 17 writing this report?  
 18 A. Well, I relied on all of the documents  
 19 that are listed on page 18 of my report.  
 20 Q. Did you read any other materials even  
 21 if you didn't actually use them in your report?  
 22 A. I don't think so. I think this is the  
 23 full set.  
 24 Q. So in preparing your report, can you  
 25 tell me what you did to prepare it?

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1 A. What I did?  
 2 Q. Yes.  
 3 A. Well, I would just simply -- generally  
 4 speaking, I tried to look at these in sort of  
 5 the chronological order in which they had  
 6 unfolded, so I'm looking at dates on them and  
 7 kind of trying to sort and then work my way  
 8 through them that way, and making notes to  
 9 myself about things that might be significant  
 10 and then going through them again and trying to  
 11 formulate an opinion. Then I -- and then I  
 12 began sitting down and writing the report.  
 13 Q. And so that sounds like it relates to  
 14 the second part of your report, which is the  
 15 application. How do you prepare the first part  
 16 of your report, which is the general overview of  
 17 research?  
 18 MR. SATIN: Objection to the  
 19 commenting on the testimony.  
 20 Q. You can answer.  
 21 A. Well, none of that is written before I  
 22 go through this, but certainly I think in theory  
 23 the first part of the report could be written  
 24 without necessarily having reviewed materials  
 25 first, but that's not the way I did it.

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1 Q. Is it similar to your other expert  
 2 reports that you've rendered in other civil  
 3 cases, the first part?  
 4 A. It would be -- it would be pretty  
 5 similar, yes.  
 6 Q. And in writing that first section this  
 7 year for this case, with the exception of the  
 8 Morgan study, did you read all of the other  
 9 studies before putting them into the report?  
 10 A. Read them anew?  
 11 Q. Yes, read them anew.  
 12 A. For purpose of this?  
 13 Q. Correct.  
 14 A. No.  
 15 Q. So how did you decide what to put in  
 16 and what not to put in?  
 17 A. Put in things that were relevant to  
 18 the -- to the points.  
 19 Q. And how did you choose the sources if  
 20 you didn't go back and read them anew?  
 21 A. Because I know what's in them.  
 22 Q. And in this case you've rendered an  
 23 invoice in, I believe it was, June or July of  
 24 2013. Have you billed Miller & Chevalier since  
 25 that time for anything?

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1 A. No.  
 2 Q. And did you meet with defense counsel  
 3 before this deposition to prepare?  
 4 A. No.  
 5 Q. Did you speak with defense counsel  
 6 during any of the breaks today about your  
 7 testimony?  
 8 A. No.  
 9 Q. And going back to just the process  
 10 that you used in putting together this report,  
 11 at what point did you come to the conclusion  
 12 that the plaintiff's ID is unreliable?  
 13 A. Probably after a second time through  
 14 the set of materials.  
 15 Q. So the first time through it wasn't  
 16 immediately apparent to you?  
 17 A. Well, the first time -- well, it might  
 18 have been readily apparent, but the first time  
 19 through I was just trying to make judgments  
 20 about what's relevant and what's not relevant,  
 21 where are things at in there, so that on the  
 22 second time through I could begin to form  
 23 opinions about those things.  
 24 Q. So how about you walk me through that  
 25 process from the first stage to the second

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1 stage. Which factors did you identify as  
2 relevant to this case?

3 A. Well, it probably won't surprise you  
4 for me to say that any factor that was relevant  
5 to acquisition, storage and retrieval, any  
6 things like descriptions or what a witness might  
7 have said about their own ability to make an ID,  
8 would be relevant.

9 Q. But let's talk about specifically what  
10 you identified as relevant with respect to the  
11 plaintiff Varda Guetta. With looking through  
12 her documents, what did you find relevant in  
13 your analysis?

14 A. Early -- fairly early statements  
15 saying that she didn't get a good view. One of  
16 the things that was relevant was her inability  
17 to give specific descriptions of the gunman, her  
18 statements about her primary concern being her  
19 son. What she had to say about, you know, the  
20 dynamics of that, of that incident; what she had  
21 to say about -- well, I guess that's most of in  
22 terms of what was of interest to me about that.  
23 But then also what she says about -- this would  
24 be in, I think, a deposition that she gave  
25 earlier this year -- about this process by which

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1 these photos were dropped off to her, and I  
2 think -- I mean, those seem like the main things  
3 that were relevant.

4 Q. The statements that you referred to  
5 that she stated she didn't get a good view of  
6 the shooters, where are you getting that from?  
7 What statements are you referring to?

8 A. That would be probably going back then  
9 to the 2007 deposition, I think.

10 Q. Varda Guetta testified that she was  
11 directly opposite the perpetrator. Well, she  
12 was directly opposite one of the four shooters  
13 in this case and that she could see the face of  
14 one of the individuals, so are you referring --  
15 when you say that she didn't get a good view,  
16 are you referring to the person she identified,  
17 the face that she testified she saw, or are you  
18 referring to the other three faceless gunmen?

19 MR. SATIN: Objection to the  
20 counsel's commenting on the evidence, and it  
21 also misstates the evidence.

22 Q. You can answer.

23 A. I don't know. I mean, I'd have to go  
24 back and find that, but my recollection was that  
25 she referred to the fact that she couldn't

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1 really provide a very good description and --

2 Q. In the deposition transcript that  
3 you're referring to, was she asked by counsel to  
4 give a description?

5 A. I don't know as though she was in  
6 2007.

7 Q. So how can you be sure that she  
8 couldn't give a description if she wasn't asked?

9 A. Because even though no one specifically  
10 said, "Can you give a description?" -- I don't  
11 think anyone specifically said, "Can you  
12 describe this person's face?" -- there was all  
13 kinds of opportunity to do so.

14 Q. But typically in a deposition you're  
15 instructed to answer the question that's asked;  
16 correct?

17 A. Yes.

18 Q. And you've been deposed before; correct?

19 A. Right.

20 Q. So you answer the questions that are  
21 asked, generally speaking; correct?

22 A. Right.

23 Q. Do you answer questions that aren't  
24 asked?

25 A. No. But if witnesses have information

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1 like a relatively specific description, they're  
2 going to be giving it all along, including in  
3 their initial police reports, which they never  
4 did -- which she never did.

5 Q. Can you be sure of that in this case?

6 A. Be sure of what?

7 Q. That if she had a description, she  
8 would have given it?

9 A. It's my opinion if she had a  
10 description, she would have given it, yes,  
11 because that would have helped. You know, any  
12 reasonable person knows that would have helped  
13 to narrow this down to who might have been that  
14 particular gunman.

15 Q. Right.

16 But this was a deposition; correct?

17 A. Right.

18 Q. So counsel was asking her questions  
19 related to the case; correct?

20 A. Right.

21 Q. She wasn't talking to the police, was  
22 she?

23 A. No, but she had earlier and also not  
24 given a description.

25 MR. SATIN: Objection. Calls for

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1 speculation.

2 Q. So is it your position that -- well,  
3 actually, was Varda Guetta asked by the police  
4 to give a description?

5 A. She says she was not.

6 Q. Do you have any reason to believe that  
7 that's not the case?

8 A. Well, I've never known police not to  
9 ask for a description.

10 Q. Well, the attack occurred not in the  
11 United States.

12 A. I understand.

13 Q. So do you express an expertise in law  
14 enforcement procedures in Israel?

15 A. No.

16 Q. So going back to your process and the  
17 factors that are relevant to you in this case,  
18 you identified a number of factors. Can you  
19 explain to me how the calculus of these factors,  
20 how you arrived at your ultimate conclusion?

21 A. An accumulation of the various  
22 circumstances and evidence and in conjunction  
23 with what we know about factors that influence  
24 the reliability of eyewitness identification and  
25 principles of perception and memory.

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1 Q. Right.

2 But how did you translate those  
3 principles into rendering an opinion on the  
4 reliability in this case?

5 A. By taking them all into consideration.  
6 I mean, what else can I say?

7 Q. Well, what does "consideration" mean?  
8 How -- what does "consideration" mean?

9 A. Well, considering the acquisition,  
10 storage and retrieval circumstances and the  
11 accumulation of all of these in a downward  
12 direction, that when compared even to more ideal  
13 circumstances, for example, that don't involve  
14 stress or fear, I mean, even those can be  
15 unreliable; but when you consider them all  
16 together, it's a very low likelihood that a  
17 person could make a reliable identification  
18 under those circumstances.

19 Q. By "very low," where does that fall in  
20 the continuum that you were speaking about  
21 earlier?

22 A. I think it's near zero.

23 Q. Isn't that expressing an opinion on  
24 the mathematical certainty from which she can  
25 make an identification in this case?

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1 A. Well, it's stating a zone of  
2 certainty, yes.

3 Q. So it's your position that the  
4 plaintiff cannot or could not make a reliable  
5 identification in this case?

6 A. In the way in which we discussed  
7 reliability before, yes.

8 Q. In getting to the almost zero  
9 possibility, can you walk me through the  
10 accumulation of factors? So, for example, one  
11 factor knocks it down. One factor knocks it up.  
12 One factor knocks it back down. How was your  
13 process in assessing those factors?

14 A. Right. Well, one of the things about  
15 these particular factors is that there's very  
16 little within the record and the known information  
17 that knocks it up. You've got, you know, the --  
18 all of the factors at the level of acquisition  
19 where you have weapon focus, fear, stress,  
20 something other than optimal lighting. You're  
21 being fired at.

22 You have distractions. You have a  
23 greater need to attend to other things than to  
24 the gunman's face such as where the gun is  
25 pointed, protecting your own safety, tending to

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1 your son. The chaos of the situation does not  
2 give you time to stop, reflect back on what you  
3 just saw and try to consolidate those things.

4 And then -- and then you have an  
5 incredible, out of the range of perhaps any  
6 identification that I've ever seen, of the  
7 passage of time, and so you -- so you have that  
8 long interval during which nothing can improve  
9 memory. It can only go in the downward  
10 direction.

11 And then you have an identification  
12 procedure that is not only undocumented, again,  
13 it's something that I've never seen in a real  
14 case, where you literally leave photos with a  
15 witness. There's no one else there to -- you  
16 know, you're not giving admonitions about being  
17 careful, making sure, because there's -- you  
18 know, it may be that the real perpetrator is not  
19 present in here.

20 You have all of these -- sort of  
21 the ill-defined status of everyone in there, you  
22 don't know whether they were -- whether they  
23 were really fillers that could be a priori ruled  
24 out. You have no indication of immediate  
25 identification, which is a reliability factor,

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1 and so -- and you have no definitive prior  
2 description against which to compare the person  
3 identified to the description.

4 Q. Well, the identification of Fawzi  
5 Murar in this case occurred in early 2013;  
6 correct?

7 A. Yes.

8 Q. But the plaintiff gave a description  
9 in one of her depositions in June of 2012;  
10 correct?

11 A. Yes.

12 Q. So why is that not relevant?

13 A. Well, it is relevant. 2012 is awfully  
14 late to be giving a description, of course, but --

15 Q. Do you know that that's the first time  
16 she ever gave a description?

17 A. As far as I know.

18 MR. SATIN: Objection. The witness  
19 should be allowed to answer the question.

20 A. At far as I know it is.

21 Q. Do you need to finish your answer?

22 A. At least in the records I saw, I  
23 didn't see any evidence of a description, other  
24 than, you know, something very generic, but  
25 nothing specific. And I think the only thing

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1 that sort of got added in at that point was  
2 something about a mustache.

3 Q. But again, I mean, you're not aware of  
4 whether anyone had asked her prior to that point  
5 to give a description?

6 A. No, but it seems to me that, you know,  
7 it's also sort of fruitless after all those years  
8 to only at that point ask for a description. I  
9 mean, the fact that it's missing is -- you know,  
10 that it's not there is relevant. It speaks to --  
11 it speaks to the credibility of the witness.

12 Q. But here it's not missing. She did  
13 give a description; correct?

14 A. In 2012.

15 Q. She still gave one; correct?

16 A. A pretty general one.

17 Q. She still gave a description; correct?

18 A. Well, not all descriptions are equal.

19 Q. But that's not my question. My question  
20 is, did Varda Guetta give a description?

21 MR. SATIN: Objection. Asked and  
22 answered.

23 Q. You can answer.

24 A. In 2012 she did.

25 Q. To the best of your knowledge, that's

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1 the earliest time she gave a description?

2 A. Other than -- other than something  
3 very generic.

4 Q. And, I mean, is it your position that  
5 if a witness is not asked to give a description,  
6 then they can no longer ever give a description?

7 MR. SATIN: Objection. Calls for  
8 speculation.

9 Q. You can answer.

10 A. Well, as time goes by, reliability of  
11 the description, like any other memory factor,  
12 gets lower. And what happens during that  
13 retention interval is again that witnesses begin  
14 to fill in things in their heads.

15 Q. Is it impossible for a witness who is  
16 not asked to give a description after an event  
17 to give a description later on in the case even  
18 if some time has passed?

19 A. Not impossible.

20 Q. It's not impossible; correct?

21 A. It's not impossible.

22 Q. Do you know how long Varda Guetta  
23 looked at the people that were shooting at her  
24 prior during this exchange?

25 A. I don't think anyone knows how long

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1 she looked at them.

2 Q. Is this something you note in your  
3 analysis?

4 MR. SATIN: Objection. Vague.

5 A. Is what something I note in my  
6 analysis?

7 Q. The amount of the exposure, the amount  
8 of time that she had to observe.

9 A. I might have referred to it as not  
10 being a long time or being a short time or  
11 something, but no one knows how long she was  
12 actually looking at anything.

13 Q. That would play into whether she could  
14 reliably ID somebody, could it not?

15 A. It would.

16 Q. And when we were talking about the  
17 continuum of reliability, the Newsomebaum case  
18 that you talked about?

19 A. Newsome.

20 Q. Newsome, sorry.

21 A. Uh-huh.

22 Q. Where does that fall in the spectrum  
23 of unreliable and reliable IDs?

24 A. Well, I think that the witnesses  
25 themselves were, as far as we can tell, quite



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1 capable of being reliable. They actually got a  
2 good view. And as far as we can tell, they all  
3 made what would be considered a reliable decision,  
4 namely the guy who committed that murder is not  
5 in this lineup. But the conditions of testing  
6 were such that they were led into a false pick,  
7 so the conditions of testing created an  
8 unreliable witness, unreliable witnesses.

9 Q. Well, here, unlike that case, you  
10 don't know how long Varda Guetta looked at the  
11 people that were shooting at her; correct?

12 A. Yeah, and we don't know in that case  
13 either, because the most you can do is ask the  
14 witness, and witnesses tend not to be very  
15 reliable in reporting about that, but --

16 Q. Did you also consider -- how did the  
17 fact that she testified that there were four  
18 shooters, how did that play into your analysis?

19 A. Well, one thing it means is that she  
20 was also looking at some others, and so there's  
21 divided attention, but it doesn't -- it doesn't  
22 play a big role, because maybe there were six.  
23 Maybe there were three. We don't know if she's  
24 accurate on that.

25 Q. Well, if she testified that there were

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1 four shooters and she testified that she saw the  
2 face of one of the four shooters, would that not  
3 indicate an increased chance of reliability  
4 since her attention was focused on one face as  
5 opposed to say she had testified "I saw all four  
6 faces"?

7 A. Well, she obviously spent some of her  
8 attention trying to look at the others, because  
9 there were -- otherwise, she wouldn't have a  
10 number; right? I mean --

11 Q. But how do you know that she spent  
12 time trying to look at others? I mean, she --

13 A. Well, you can't not know the number or  
14 have a number that you're giving if you weren't  
15 spending some time looking.

16 Q. But do you know how much time she  
17 spent doing that?

18 A. No.

19 Q. So it could have been two seconds;  
20 correct?

21 A. Could have been.

22 Q. But all of this is relevant; right?

23 MR. SATIN: Objection. Vague.

24 A. Not completely irrelevant, I suppose,  
25 but not a major consideration.

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1 Q. Did you mention the number of shooters  
2 in your report?

3 A. I don't think I did.

4 Q. Is that because you found it to not be  
5 a relevant consideration?

6 A. Yes.

7 Q. And even as we talk about it now, do  
8 you still think it's not a relevant consideration?

9 A. Well, if I would have mentioned it, I  
10 would have mentioned it as yet other distractions  
11 from the one shooter.

12 Q. But it could also be flipped to the  
13 reverse. She could have -- the fact that she  
14 focused on one as opposed to trying to identify  
15 all four, isn't that still relevant?

16 A. No, because if there had been only one  
17 shooter, it wouldn't have -- even if there had  
18 only been one shooter, that doesn't -- that doesn't  
19 negate all of these more important variables, the  
20 fear, the stress, the --

21 Q. What's the difference -- so say there  
22 was one shooter and she looked at one shooter  
23 the entire time or there are four shooters and  
24 she looked at one shooter the entire time. How  
25 does that decrease the chances of reliability?

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1 A. I don't think it impacts it one way or  
2 the other.

3 Q. But you just said that if you were to  
4 include this in your report, you would say that  
5 the fact that there were four shooters decreased  
6 the reliability.

7 A. If anything, but we know that she  
8 didn't look at the one shooter the whole time,  
9 because you can't count the number of shooters  
10 and only be looking at one shooter.

11 Q. Right.

12 But that's just your -- you don't  
13 have any reason, other than the facts as you  
14 know them, to make that conclusion; correct?

15 MR. SATIN: Objection. Vague.

16 A. I think --

17 Q. Did you read a police report, for  
18 example?

19 A. What was the prior -- what was the  
20 previous question?

21 Q. The previous question is, what are you  
22 basing that statement on?

23 A. Which statement?

24 Q. The statement that she couldn't have  
25 looked -- she had to have spent a certain amount

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1 of time looking at all four shooters in order to  
2 know that there are four shooters there.

3 A. Well, if she's the source, the  
4 original source, of the information that there  
5 were four shooters as opposed to, for example,  
6 which I don't know, afterward on some other  
7 grounds somebody else gives her information  
8 saying there were four shooters, then in order  
9 to know that there were four shooters, some of  
10 her attention -- and it could be minuscule. It  
11 could be more -- would have had to have been  
12 directed at the other three in order to know  
13 that.

14 Q. So going back to your balancing of the  
15 factors, you've identified factors that have  
16 played into your analysis, but can you describe  
17 to me the value that you're ascribing to each  
18 of these factors in order to arrive at the  
19 conclusion that there is a nearly zero chance  
20 that the plaintiff could make an accurate  
21 identification in this case?

22 A. Well, I would -- in order to answer  
23 that, I would have to ask you probably to  
24 rephrase it in order to -- because I don't say  
25 0 percent chance of accurate identification. I

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1 think 0 percent chance of -- I think it's more  
2 that the reliability of the identification is  
3 close to zero, and that's not the same thing;  
4 right?

5 If you give somebody a choice  
6 between two photos, one of whom is the real one,  
7 right, and I can -- and then what they do is  
8 they close their eyes and they're mixed up and  
9 then they throw a dart and they hit one of the  
10 two, they got a fifty-fifty chance; right?  
11 But it's still an unreliable procedure. So  
12 we're talking about -- or, I mean, unreliable  
13 identification, so we're talking about  
14 reliability being nearly zero; right?

15 So with that qualification, what  
16 weight did I give to the various factors?

17 Q. Yes, but before you answer that, did  
18 Varda Guetta --

19 MR. SATIN: I think there's a  
20 question pending, though, so I think he needs to  
21 answer that question that's pending.

22 Q. Well, I'll withdraw that question and  
23 then I'll reask it.

24 Did Varda Guetta take the photo  
25 array and put them out and mix them around and

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1 close her eyes and say, "That's the guy"? Do  
2 you know that to be the case?

3 A. No, and I'm not saying she did. I was  
4 making a distinction between reliability and  
5 accuracy, which we discussed extensively early  
6 on.

7 Q. Correct.

8 But I'm asking you, in this case  
9 did she do that?

10 A. No.

11 Q. She actually looked at the pictures;  
12 correct?

13 A. Oh, yes.

14 Q. Now, going back to my earlier question  
15 about the value that you've ascribed to these  
16 factors, if you could walk me through the balance  
17 of these factors and how they ultimately led you  
18 to your conclusion about the reliability of the  
19 ID.

20 A. Right. Well, I would -- I would take  
21 the acquisition, storage and retrieval factors  
22 in this particular case, and I would say that  
23 they are roughly equal in their impact on that  
24 conclusion.

25 Q. Roughly equal in what sense?

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1 A. Well, you asked me how I weighted  
2 those, so I'm saying I'm weight -- in this  
3 particular case I would weight them about  
4 equally.

5 Q. So you're saying that they each have a  
6 third relevance to this?

7 A. Right. You know, they are -- each of  
8 the three are huge factors here. It's not that  
9 one of them is small, you know, and the other  
10 two are huge.

11 Q. So in this case, and correct me if I'm  
12 mistaken, but you view these three categories as  
13 roughly equal, so to get to a zero -- nearly  
14 zero chance of reliability, as distinguished  
15 from accuracy, you would ascribe approximately a  
16 one-third percentage to each one?

17 A. I guess I wouldn't say it exactly like  
18 that, because I think that any two of the three  
19 could get you to the nearly zero reliability.  
20 So when I say that they're roughly equal, what I  
21 mean is that you can take any two of those three  
22 and probably get to that conclusion.

23 Q. Do you explain this in your report?

24 A. No.

25 Q. In assessing the reliability of the

1 ID, don't you think that the way that you reach  
2 that conclusion is relevant?

3 A. No, because I'm taking into account  
4 the totality in getting to the bottom line. I'm  
5 not going along the line and saying by this  
6 point here would be my opinion. I'm saying --  
7 you know, I mean, I'm looking at these things  
8 and then at the end reaching an overall opinion.  
9 I'm not bringing the report reader or in my  
10 report going along and assigning some kind of  
11 opinion with regard to overall reliability at  
12 each point in moving through it.

13 Q. But when you render an opinion in a  
14 case, aren't you supposed to explain your  
15 rationale and formula in reaching that?

16 A. And formula? Well, it's not a  
17 formula. I mean, we've talked about that, but I  
18 think -- let me see, if I might look at my report  
19 here. I think I -- I think I do so in my  
20 summary before I get to that last -- well --

21 Q. If you can point me to that sentence,  
22 or explanation, rather.

23 A. All right. "The conditions of memory  
24 acquisition are so poor as to render it unlikely  
25 that VG could reliably distinguish between the

1 actual gunman and other dark-skinned Palestinian-  
2 looking men with mustaches." "Twelve-year  
3 retention interval between the shooting event  
4 and the identification attempt." "The procedures  
5 used for securing a pick of a photo by VG" and  
6 then "in totality." So those are the -- I mean,  
7 I think that is saying how I got there.

8 Q. But it doesn't explain the breakdown,  
9 does it?

10 A. No, but I've never seen anyone ever do  
11 that, and I can't see why one would. I mean,  
12 say, okay, if you take these two, you would  
13 reach this conclusion. If you take this other  
14 two combination, you reach this. And then  
15 there's a third two combination in which you  
16 might reach this.

17 It's irrelevant, because the  
18 question is what's the totality of it, not what  
19 are some hypothetical combinations of this that  
20 might -- and how they would combine if you only  
21 had two of these instead of all three.

22 Q. All right. So why don't you turn to  
23 page 12 to 13 of your report. And I'm going to  
24 draw your attention to the paragraph that begins  
25 with "With regard to acquisition."

1 A. Uh-huh.

2 Q. Specifically to the sentence, "Hence,  
3 she was experiencing great fear, stress, and  
4 panic, each of which would impair her ability to  
5 encode details about the face of the gunman.  
6 The chances that an individual under these  
7 circumstances could acquire the type of detailed  
8 memory for the face of a stranger that would  
9 permit a reliable identification of the gunman  
10 among a set of other dark-skinned individuals  
11 with mustaches is nearly zero."

12 How do you know that this happened  
13 for sure, that her -- we'll take it one step at  
14 a time. How do you know that the fear, stress  
15 and panic that she experienced actually, in  
16 fact, impaired her memory?

17 A. Because fear, stress and panic impair  
18 human memory.

19 Q. But all you're relying on for that are  
20 the studies; correct?

21 A. That's what science relies on. What  
22 are they supposed to -- what's science supposed  
23 to rely on if not studies?

24 Q. But I just want to get the answer for  
25 the record. That's what you're relying on when

1 you make the statement; correct?

2 A. And our general understanding in  
3 psychological science about how the brain works.

4 Q. Couldn't there be a situation where a  
5 person who experienced fear, stress and panic  
6 did not have their memory impaired to an extent  
7 where they would not be able to ID somebody?

8 A. Did not have it impaired to that  
9 degree?

10 Q. Yeah.

11 A. Sure.

12 Q. So in this situation would it not have  
13 also been accurate to say she was experiencing  
14 great fear, stress and panic, each of which may  
15 have impaired her ability to encode details?

16 A. No, I would stick with "would impair  
17 her ability to encode."

18 Q. So you're saying in this situation her  
19 memory -- her ability to encode was, in fact,  
20 impaired?

21 A. That's what stress and fear do.

22 Q. So in her situation you're saying that  
23 Varda Guetta's memory was impaired?

24 A. If you -- if one were to somehow be  
25 able to make a persuasive case that she wasn't

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1 undergoing fear and stress, then no. I mean,  
2 I'm -- but as long as there's fear and stress,  
3 that's what happens.

4 Q. So my question is, because Varda  
5 Guetta experienced fear and stress during this  
6 event, it's your position that her memory was  
7 impaired so that she could not encode details  
8 about the crime?

9 A. It impaired her ability to encode  
10 details. I'm not saying that she couldn't  
11 encode something, but details, that's another  
12 matter.

13 Q. And moving on to the next sentence  
14 where you talk about "The chances that an  
15 individual under these circumstances could  
16 acquire the type of detailed memory for the face  
17 of a stranger that would permit a reliable  
18 identification is nearly zero." So what's the  
19 significance of the details in this statement?

20 A. What's the -- what's the significance  
21 of the details?

22 Q. You just said that her ability to  
23 encode --

24 A. Right.

25 Q. -- is a separate issue from her

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1 ability to have a detailed memory; is that  
2 correct?

3 A. No, I didn't mean to say that if I  
4 did.

5 Q. Okay. So just explain to me then your  
6 basis for this statement.

7 A. The basis for that statement is the --  
8 is the circumstances within that event; right?

9 Q. Uh-huh.

10 A. Where her primary concern is her son.  
11 She's experiencing fear, stress, panic. She's  
12 being fired upon. And so in order to then be  
13 able to recognize the face of someone under  
14 the -- who was seen under those circumstances at  
15 a later point in time requires this -- requires  
16 having acquired significant detail.

17 Faces are very complex. Especially  
18 since it has to be -- it can't just be, you  
19 know, something like Arab-looking male. I mean,  
20 it has to be specific. It has to have that all --  
21 you know, for accurate recognition to occur, you  
22 have to have a memory for, you know, mouth,  
23 eyes, nose, chin. You've got to have detail.

24 Q. And do you have any reason to believe  
25 that that was not the case here?

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1 A. Yes.

2 Q. What's that reason?

3 A. Well, that it's hard enough to acquire  
4 those memories without those kinds of  
5 circumstances going on. You know, eyewitness  
6 misidentification occurs under much more  
7 favorable circumstances than that, and yet  
8 people misidentify and fail to come away with  
9 detailed information.

10 And the fact that she could never  
11 articulate any of those facial features beyond  
12 by the -- by 2012, which is many, many, many  
13 years later, saying something about a mustache.  
14 Otherwise, there's really nothing -- there's no  
15 detail there.

16 Q. Do you know whether anybody asked her  
17 about details prior to 2012?

18 A. Well, the records are very poor, and  
19 so it's hard for me to believe someone didn't,  
20 but certainly there's no -- there's nothing on  
21 record indicating that there was any detailed  
22 description.

23 Q. If the records are really poor, how  
24 can you render an opinion on whether the ID is  
25 reliable?

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1 A. Well, if there had been a detailed  
2 description and -- you know, that would have  
3 changed my opinion, but there appears to not  
4 have been one.

5 Q. But didn't we talk earlier about how  
6 description accuracy is not necessarily a -- I  
7 think you described it as a modest indicator of  
8 reliability. So how could that take this ID,  
9 which has a nearly zero chance --

10 A. An indicator of the --

11 Q. Well, let me finish my question first.

12 A. Go ahead. Okay.

13 Q. How could taking a modest factor such  
14 as a detailed description take an ID that is  
15 nearly zero and change your opinion on the  
16 reliability of it?

17 A. Can you re -- can you rephrase it?

18 Q. So say there was a detailed  
19 description. Let's use a hypothetical.

20 A. Uh-huh.

21 Q. Let's say everything else being equal,  
22 the plaintiff gave an extremely detailed -- she  
23 gave a detailed description sometime after the  
24 crime with enough of a time passage that it  
25 wouldn't cause you concern.



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1 A. Uh-huh.

2 Q. With everything else being equal, that  
3 one factor, that would change the whole calculus  
4 of reliability here?

5 A. It would -- it would raise it some,  
6 because it would indicate that she must have had  
7 a reasonable view somehow despite these conditions  
8 and circumstances.

9 Q. And is it your position that just because  
10 she wasn't asked, that there's no way that she  
11 could have these details properly encoded in her  
12 mind?

13 A. No. I think it's my position that the  
14 fact that no such details were ever provided is  
15 consistent with what you might expect from this  
16 level of fear, stress, anxiety and distraction  
17 and chaos of that scene.

18 Q. Can stress and fear make a person  
19 hyperfocused?

20 A. Hyperfocused?

21 Q. Even more attentive to detail than  
22 they otherwise would be.

23 A. No, there's no -- there's no evidence  
24 of that. Sometimes under fear or stress, at  
25 later points in time people will when recalling

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1 it have this experience of it being all kind of  
2 slow motion and so on, but it's largely just an  
3 illusion from having rehearsed it many times.

4 Q. Is the Morgan study one of the leading  
5 pieces of literature in this field on this topic?

6 A. It is.

7 Q. So when you say that there is no  
8 evidence to support the conclusion that stress  
9 may make someone hyperfocused, you're really  
10 relying on that body of literature?

11 A. And our understanding of how the brain  
12 works.

13 Q. Where does that come from?

14 A. It comes from the broadly accepted  
15 view that especially when fear is involved, that  
16 it triggers automatically survival mechanisms so  
17 that all the resources of the cognitive system,  
18 of the thinking system, of the processing system,  
19 are devoted to survival-relevant things, which  
20 means things like avoiding the gunfire, tending  
21 to your son, ducking out of the way and not to  
22 details that are irrelevant to survival like,  
23 for example, what somebody's face looked like.

24 Q. So would you say that there's a  
25 difference between crimes against the person and

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1 crimes against property in the sense -- let me  
2 actually just be more precise in my question.

3 A difference in the sense of the  
4 fear and stress that will be produced by either  
5 type of crime?

6 A. Yes. I mean, stress and fear levels  
7 are going to be higher when there's some -- when  
8 there's some level of fear for your own personal  
9 safety as opposed to, let's say, things that you  
10 own. But certainly you can feel stress and fear  
11 from a property crime if you're a witness to it,  
12 but not -- generally speaking, wouldn't be as  
13 high.

14 Q. So shouldn't there be a distinction  
15 then in the studies and the literature that show  
16 that identifications in property crimes are  
17 higher than in crimes against the person?

18 A. No, not necessarily, because crimes  
19 against the person -- like, for example, when we  
20 break down things and we look at things like --  
21 if we just look at things like, for example, we  
22 find that victim witnesses -- like when we break  
23 down from actual cases, we sit and we break down  
24 these kinds of factors, we see that victim  
25 witnesses tend to be closer to the perpetrator

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1 than bystander witnesses. So you have to  
2 consider then not -- at the same time, victim  
3 witnesses do have higher levels -- would, as  
4 generally expected, they have higher levels of  
5 fear and stress than bystander witnesses.

6 But so you have to consider not  
7 necessarily whether they're a victim or a  
8 bystander, but rather what are these -- there's  
9 nothing special about being a victim or a  
10 bystander. It's sort of asking what are the  
11 relevant mechanisms that are at play there, not  
12 the status of being a victim or a bystander.

13 Q. So then there isn't literature that  
14 distinguishes between crimes that induce  
15 different levels of fear or stress and then  
16 compares those levels to identification  
17 reliability?

18 A. Well, certainly in the -- you know,  
19 actual levels of fear and stress are difficult  
20 to measure like in real cases, so you have to  
21 make inferences from the nature of the -- of the  
22 crime. So, for example, when we study real  
23 cases, one could assume that if one -- if it was  
24 an armed robbery where there's a gun involved  
25 that was pointed at you, that your fear and

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1 stress level was higher.

2 But there are other things going  
3 on there, so you have to compare it to whether  
4 there -- when you -- when there wasn't a gun  
5 involved, are you holding constant all of the  
6 other variables like distance and how long they  
7 looked at the person and things like that.

8 Q. Has there been any comparisons of this  
9 issue in actual cases as opposed to controlled  
10 studies?

11 A. Yeah, where you -- we've coded --  
12 we've coded those variables in actual cases, and  
13 then what we do is we look at their propensity  
14 to -- their ability then to make any kind of  
15 identification, the rates at which they pick  
16 fillers and rate which they pick suspects.

17 Q. And are any of those tied to crime  
18 severity?

19 A. Any what?

20 Q. Are any of those tied to crime  
21 severity?

22 A. Well, they're naturally confounded  
23 with crime severity. In other words, if you  
24 code something like, you know, weapon, no  
25 weapon, right, I mean, weapons are more severe --

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1 involve more severe crimes. If you -- you know,  
2 and so, I mean -- and you can look at things  
3 like simple assault versus armed robbery versus  
4 murder cases, and obviously those are three  
5 levels of crime severity.

6 But it's not the -- but what you  
7 have to do is you have to recognize that there  
8 are lots of things that change when you look at  
9 one of these cases versus another case versus  
10 another kind of case, such as you have to  
11 control for how close the witness was, whether  
12 the lighting conditions are the same.

13 When you're looking at these real  
14 cases, what you find is that for some reason, we  
15 found this kind of repeatedly, that when there  
16 is a weapon involved, there tends to be a  
17 shorter period of time between the event and the  
18 lineup, maybe because they find the suspect  
19 faster. So there's lots of -- lots of things  
20 going on in those real cases.

21 Q. And couldn't the fact that the  
22 plaintiff in this case had her son in the car  
23 and obviously wanted to make sure that he was  
24 going to be okay, would that have displaced her  
25 own fear and stress at all for herself?

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1 A. Well, it's not a question of whether  
2 you are --

3 MR. SATIN: Objection. Calls for  
4 speculation.

5 A. -- stressed for yourself. You know,  
6 if your loved one's shot, you're stressed.

7 Q. Correct.

8 But are the same psychological  
9 processes at work in a situation where you are  
10 thinking about yourself and survival versus a  
11 loved one?

12 A. Yes, because the same process is  
13 involved because your cognitive resources are  
14 going to the survival task, not to some kind of  
15 calm and optimal kind of encoding of details of  
16 something else.

17 MS. ROMEO: Okay. Let's take a  
18 quick break, a couple-minute break.

19 THE WITNESS: Okay.

20 (A recess was taken.)

21 Q. What photos did you review in this  
22 case?

23 A. The 15 or so photos that were given to  
24 the witness in this case earlier in 2013.

25 Q. We're going to mark this as -- I

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1 believe it's Plaintiffs' Exhibit 5.

2 (Plaintiffs' Exhibit 5 marked on  
3 the record)

4 MS. ROMEO: What I'm handing Dr.  
5 Wells is a packet of -- I believe it's 15  
6 photos. 15 photos.

7 Q. Are these the photos that you just  
8 referenced?

9 A. They appear to be, yes.

10 Q. And did you review any other photos?

11 A. I don't believe I did, no.

12 Q. Did you review any other E-mails -- or  
13 which E-mails did you review in this case?

14 A. Just this one that I listed here that  
15 was an E-mail from Tolchin, Tolchin.

16 Q. Right.

17 And the date of that is what?

18 A. February 19, 2013, apparently.

19 Q. And you also note on your documents  
20 reviewed list that you viewed a photograph of  
21 Fawzi Murar.

22 A. Right.

23 Q. Is that the same photograph that's in  
24 this photo array or is it a different one?

25 A. I can't remember if it was exactly

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1 this photograph or another one.

2 Q. I'm going to mark as Plaintiffs'  
3 Exhibit 6 an exhibit which was attached to a  
4 letter submitted to the Court by defendants,  
5 Exhibit 10 -- I believe it was sometime in May  
6 2013 -- with an E-mail.

7 (Plaintiffs' Exhibit 6 marked on  
8 the record)

9 Q. And you can take a look at that.

10 MR. SATIN: I'll object to the  
11 commenting on the evidence.

12 Q. You can take a look and let me know if  
13 you've seen that before.

14 A. Yes, this appears to be the same as  
15 what I was sent.

16 Q. So just to be clear, what's the date  
17 on this E-mail?

18 A. February 19, 2013.

19 Q. And who sent it?

20 A. It says it was sent by Bob Tolchin,  
21 Tolchin.

22 Q. And is there an attachment to this  
23 document?

24 A. Yes.

25 Q. And what's that attachment?

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1 A. A pretty bad copy of a photograph.

2 Q. Does that photograph appear to be the  
3 same photograph of the picture that Varda Guetta  
4 identified in the photo array that was the 15  
5 pictures?

6 A. It's certainly consistent with it.  
7 You know, it's difficult to know for sure, but  
8 it appears to me to be the same.

9 Q. So then to the best of your  
10 recollection, did you only view one photograph  
11 of Fawzi Murar? I'm just trying to -- here you  
12 say you viewed, Number 2, "Photograph of Fawzi  
13 Murar," and Number 1, "Array of photographs."

14 A. Yeah, I think I had gotten something  
15 like this before I got these.

16 MS. ROMEO: If you reviewed  
17 pictures that are not listed on this report, we  
18 ask that defense counsel update that list and  
19 then produce any of the -- if you viewed a  
20 different picture of Fawzi Murar.

21 Q. So aside from this photo array, and  
22 potentially that picture, did you view any other  
23 photographs in this case?

24 A. I don't believe I did, no.

25 Q. And did you review any other E-mails

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1 in this case?

2 A. No.

3 Q. Are you aware that Varda Guetta, for  
4 the purposes of identifying a suspect in this  
5 case, looked at a photo prior to the photo array  
6 in February of this year?

7 A. Yes.

8 Q. And where did you see that?

9 A. I can't remember. You know, I can't  
10 remember where I got that information.

11 Q. You can take a minute to look at the  
12 documents reviewed list and see if anything  
13 refreshes your memory.

14 A. It doesn't, so I'm not sure -- I did  
15 know that. I'm not sure how I knew it.

16 Q. Do you remember anything else about  
17 that, about those circumstances?

18 A. That she had not identified anyone  
19 from whatever she might have been shown.

20 Q. Do you know what she was shown?

21 A. I was never provided with any photos  
22 at that point about that; so when I say do I  
23 know what she was shown, no, because I've never  
24 seen that.

25 Q. But you were aware that she had

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1 negatively ID'd somebody?

2 A. Somehow I was aware of that.

3 Q. You reviewed the November 20  
4 transcript in this case, right, that was before  
5 Judge Ellis?

6 A. That hearing.

7 Q. That hearing transcript?

8 A. Right.

9 Q. Do you think you learned it from  
10 there?

11 A. That's possible. As I think about it,  
12 that would be my guess, but --

13 Q. Well, why guess when we have exhibits.  
14 So we're going to mark this as Exhibit --

15 MS. ROMEO: I'm sorry, what are we  
16 on now before I lose track? 7?

17 THE COURT REPORTER: 7.  
18 (Plaintiffs' Exhibit 7 marked on  
19 the record)

20 MS. ROMEO: And I'd just like to  
21 note for the record that I believe there's a  
22 date transcription error on the front cover of  
23 this. It says "November 20, 2011," but this is  
24 a transcript from November --

25 THE WITNESS: 2012.

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1 MS. ROMEO: Yeah, this is from  
2 2012, so just noting that for the record. This  
3 is a discovery conference that was held before  
4 Magistrate Judge Ellis in this case.

5 Q. I am going to turn your attention to  
6 the top of page 26. Just take a look at that  
7 and let me know when you're finished.

8 Just let me know when you're  
9 finished.

10 A. Yeah, I'm finished.

11 Q. So does this refresh your recollection  
12 as to whether you reviewed a document that  
13 indicates that she negatively ID'd somebody?

14 A. Right, although it --

15 Q. It's just a yes or no question. Is  
16 this the document that you were referring to?

17 A. This is the document. This would have  
18 been the document I was referring to about her  
19 being shown a photo previously, yes.

20 Q. So after you read this, was this one  
21 of the things that you called defense counsel up  
22 for and asked them?

23 A. I might have asked them for that. I  
24 was actually -- although my main interest in  
25 asking for more photos, or for more information

Page 202

1 about photos, concerned these photos.

2 Q. Why would it not have been equally  
3 important to see the photo or photos that she  
4 was shown prior to this photo array?

5 A. Well, you know, I think it -- I think  
6 it was relevant potentially. And I'm assuming  
7 that I did ask if they had that. I'm not -- but  
8 I never received something like that, so I  
9 suspect that they didn't have it.

10 Q. If you had received -- so taking a  
11 step back, do you remember asking them, yes or  
12 no?

13 A. Not explicitly.

14 Q. So does that mean no?

15 A. It means I don't -- do not explicitly  
16 remember. Yeah, I do not remember asking them,  
17 but I do not remember not asking them.

18 Q. So the answer to that question is no?

19 MR. SATIN: Asked and answered.

20 A. The answer to that question is I don't  
21 know.

22 Q. I'm just going to pose the question  
23 one more time.

24 A. Okay.

25 Q. Do you remember, do you recall asking

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1 defense counsel for more information about the  
2 photo or photos that Varda Guetta viewed prior  
3 to the February 2013 photo array?

4 MR. SATIN: Objection. Asked and  
5 answered.

6 Q. You can answer.

7 A. I do not recall.

8 Q. And do you know whether the photo or  
9 photos that were shown to Varda Guetta prior to  
10 this photo array, do you know whether the same  
11 photos appear in this photo array?

12 A. I do not know.

13 Q. Wouldn't that be extremely relevant if  
14 the same photo showed up again?

15 A. Yes.

16 Q. So wouldn't that have been extremely  
17 important to have asked defense counsel for?

18 A. Well, and I did ask if any of these  
19 photos were what was shown to her before. I do  
20 remember that.

21 Q. And when did you ask that?

22 A. When?

23 Q. Yeah, when.

24 A. I don't know. I'm guessing in June or  
25 something.

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1 Q. Do you remember who you asked?

2 A. No. Maybe Tim O'Toole.

3 Q. And what was his response?

4 MR. SATIN: Objection. Privileged.  
5 Don't answer.

6 MS. ROMEO: The documents that  
7 he reviewed are subject to -- they're not  
8 privileged, so you can go ahead and answer.

9 MR. SATIN: No, don't answer the  
10 question.

11 Q. Are you following that instruction or  
12 are you going to answer the question?

13 A. I don't know. I've never been placed  
14 in this situation before.

15 MR. SATIN: We're instructing the  
16 witness not to answer the question.

17 Q. So are you going to follow the  
18 instruction or are you going to answer whether  
19 you received an answer in response to your  
20 question about more information needed to assess  
21 this ID?

22 A. Umm.

23 Q. Okay.

24 MR. WISE: Hold on. He's been  
25 instructed not to answer.



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1 Q. I'll rephrase.

2 Did you receive any documents  
3 after asking for more information in this case?

4 MR. SATIN: Objection. Assumes  
5 facts not in evidence.

6 Q. You can answer that.

7 A. All the documents I received, as far  
8 as I know, are listed here.

9 Q. And no one provided you with a photo  
10 or photos that Varda Guetta viewed prior to this  
11 photo ID; correct?

12 A. Correct. Although I do remember reading  
13 this and, frankly, not being able to quite tell  
14 what they're talking about here, so -- because  
15 at one point it seems to -- one way of reading  
16 this is they showed her a photo, and it doesn't  
17 show that she rejected it, which is different  
18 from what we talked about before. We talked  
19 about the phrasing is "and she wasn't able to  
20 identify," which is not the same thing.

21 Q. Right.

22 But beyond this, you reviewed no  
23 documentation about this prior ID; correct?

24 A. Umm.

25 Q. It's a yes or no question, if you

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1 reviewed any documents about --

2 MR. SATIN: Just because you say  
3 it's a yes or no question doesn't make it a yes  
4 or no question. The witness may answer as he  
5 sees fit to the question.

6 MS. ROMEO: The witness can  
7 answer.

8 A. So ask me the question again.

9 Q. So the question is, aside from this  
10 reference that you just pointed to in this  
11 transcript, did you review any other  
12 documentation, whether photos or E-mails, et  
13 cetera, relating to the prior identification?

14 A. There was no prior identification, was  
15 there?

16 Q. Prior negative identification.

17 A. No.

18 Q. So you don't know what this statement  
19 really means?

20 A. I still don't know what this statement  
21 means.

22 Q. Did you include this in your report?

23 A. No.

24 Q. Why not?

25 A. Because I don't know what this

Page 207

1 statement means.

2 Q. Can you say with confidence that the  
3 circumstances surrounding this prior negative  
4 identification could have no effect on your  
5 opinion as it stands today?

6 A. Not with 100 percent confidence, no.

7 Q. So you felt that despite not having  
8 this information, that you could take what was  
9 already, I think you testified earlier, a poor  
10 record and render an opinion on the reliability  
11 of this ID?

12 MR. SATIN: Objection. Misstates  
13 the testimony.

14 Q. You can answer.

15 A. Well, the records -- there are poor  
16 records, but there also are known facts. The  
17 amount of time that passed, for example, is a  
18 known fact. The chaos of the original situation  
19 is a known fact. The dropping off of photos to  
20 her with -- of 15 photos, totally unsupervised  
21 and undocumented, is a fact.

22 There's not -- it's hard for me to  
23 imagine that there would be much of anything in  
24 the prior -- although it's possible. I mean, I'm  
25 not rule -- you know, I can't rule out anything --

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1 in a previous photo that was shown to her that  
2 she could not confidently identify. I don't see  
3 how that could dramatically -- that's not going  
4 to change the poor acquisition, retention and  
5 retrieval conditions.

6 Q. But regardless of whether it ultimately  
7 would have changed your conclusion to saying it  
8 was reliable, for example, it still would be a  
9 relevant factor in the analysis; correct?

10 A. It could be relevant. It depends on  
11 what's there, yes.

12 Q. But in this case you don't know what's  
13 there?

14 A. Right.

15 Q. And you don't state this in your report;  
16 correct?

17 A. Correct.

18 MS. ROMEO: Let's take a quick  
19 break.

20 Can we just go on for one moment?  
21 I'm sorry. We're taking a quick break, and I  
22 just want to instruct the witness not to discuss  
23 his testimony with counsel. Thanks.

24 (A recess was taken.)

25 MS. ROMEO: We can go back on the

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1 record.

2 Q. So, Dr. Wells, is it your professional  
3 opinion that Fawzi Murar was not present on the  
4 night of the attack that took place on January 8,  
5 2001?

6 A. I've said nothing about that in my  
7 report. That's not my task.

8 Q. So what is your professional opinion  
9 on that question, that he was not present?

10 MR. SATIN: Objection. Asked and  
11 answered.

12 Q. You don't have one; is that correct?

13 A. My opinion has to do with the  
14 reliability of the eyewitness' identification,  
15 not with where he was or anybody else was on  
16 that night.

17 Q. And then you're also not rendering a  
18 professional opinion on whether if Fawzi Murar  
19 was there whether he is actually, in fact, the  
20 man that Varda Guetta saw; correct?

21 A. That's not -- that's not my task.

22 Q. And you're also not rendering a  
23 professional opinion that if Fawzi Murar was  
24 there, that maybe he was a fifth shooter or a  
25 sixth shooter, for example?

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1 MR. SATIN: Objection. Vague.

2 A. I have no basis for any such opinion.

3 Q. So you have no basis for any opinion  
4 about whether Murar is actually, in fact, the  
5 man that the plaintiff saw that night; correct?

6 A. I have an opinion about the evidence  
7 that's being used to claim that he is, the  
8 eyewitness evidence that's being used to claim  
9 that he is.

10 Q. Right.

11 But is it your professional  
12 opinion then that Murar, Fawzi Murar, is not the  
13 man that Varda Guetta saw?

14 A. How's that different from the question  
15 you asked before?

16 Q. Well, you just told me that your opinion  
17 is about the reliability of the ID; correct?

18 A. Right.

19 Q. So what I'm asking you is whether you  
20 are rendering any professional opinion on whether  
21 Murar was, in fact, the person that she saw.

22 A. That would require me to know everything  
23 in this case.

24 Q. Which you don't know?

25 A. I don't know everything. I don't know

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1 why he was singled out in the first place. I  
2 don't know what alibi he might have. I don't  
3 know what other witnesses might say about where  
4 he was at the time. I don't know about -- I  
5 don't know anything about him. The question  
6 you're asking -- of course, I would have no  
7 opinion on that, because that depends on the  
8 totality of all the facts in the case, whereas  
9 I'm only talking about the reliability of the  
10 identification.

11 Q. So do you have any reason, independent  
12 of this ID then, to believe that Fawzi Murar is  
13 not one of the four shooters in this attack?

14 A. I don't have reason to believe he is  
15 or he isn't. I think that's clear in my opinion  
16 that with regard to the evidence I reviewed, it  
17 really doesn't -- it doesn't incriminate or  
18 exculpate.

19 Q. So you have no professional opinion on  
20 that issue; is that correct?

21 A. Where that issue is?

22 Q. That issue is whether Murar was, in fact,  
23 one of the shooters on the night of the attack  
24 against the plaintiff and her then twelve-year-  
25 old son.

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1 A. It would be unprofessional of me to  
2 render such an opinion.

3 MS. ROMEO: All right. I think we  
4 are done here.

5 MR. SATIN: Okay.

6 (Deposition concluded at 3:32 p.m.)

7 (The deposition of Gary L.

8 Wells, Ph.D., is now complete. When  
9 transcribed, the original of the deposition  
10 shall be given to Ms. Romeo. The original  
11 exhibits shall be distributed as follows:  
12 Plaintiffs' Exhibits 1-7 enclosed with  
13 original transcript.)

## ACKNOWLEDGMENT

I, GARY L. WELLS, Ph.D., hereby  
 certify that I have read the transcript of my  
 testimony taken under oath in my deposition on  
 October 30, 2013; that the transcript is a true,  
 complete and correct record of my testimony, and  
 that the answers on the record as given by me  
 are true and correct.

\_\_\_\_\_  
 GARY L. WELLS, Ph.D.

Signed and subscribed to before me  
 this \_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
 Notary Public, State of Iowa

## CERTIFICATE

I, DEBRA A. HOADLEY, C.S.R., a  
 Notary Public within and for the state of  
 Iowa, do hereby certify:

That GARY L. WELLS, Ph.D., the  
 witness whose deposition is herein set  
 forth, was fully sworn by me and that such  
 deposition is a true record of the  
 testimony given by such witness.

I further certify that I am not  
 related to any of the parties to this action  
 by blood or marriage; and that I am in no way  
 interested in the outcome of this matter.

IN WITNESS WHEREOF, I have  
 hereunto set my hand this \_\_\_\_ day of  
 \_\_\_\_\_, 2013.

\_\_\_\_\_  
 DEBRA A. HOADLEY, C.S.R.

## \*ERRATA SHEET\*

CASE: MARK I. SOKOLOW, ET AL., vs. THE  
 PALESTINE LIBERATION ORGANIZATION, ET AL.  
 DATE: OCTOBER 30, 2013

WITNESS: GARY L. WELLS, Ph.D.

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\_\_\_\_\_  
 GARY L. WELLS, Ph.D.

Subscribed and sworn to before me  
 this \_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
 Notary Public

<b>A</b>	167:10	5:14 215:12	99:3	<b>analyses</b>
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